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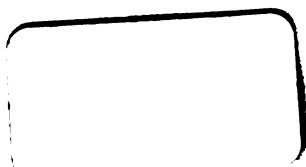
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LEADING CASES
OF THE
COURT OF CIVIL APPEALS
OF THE
STATE OF TENNESSEE
WITH
SYLLABI AND NOTES

By
JOSEPH C. HIGGINS
Associate Justice.

VOL. V.

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PREFACE.

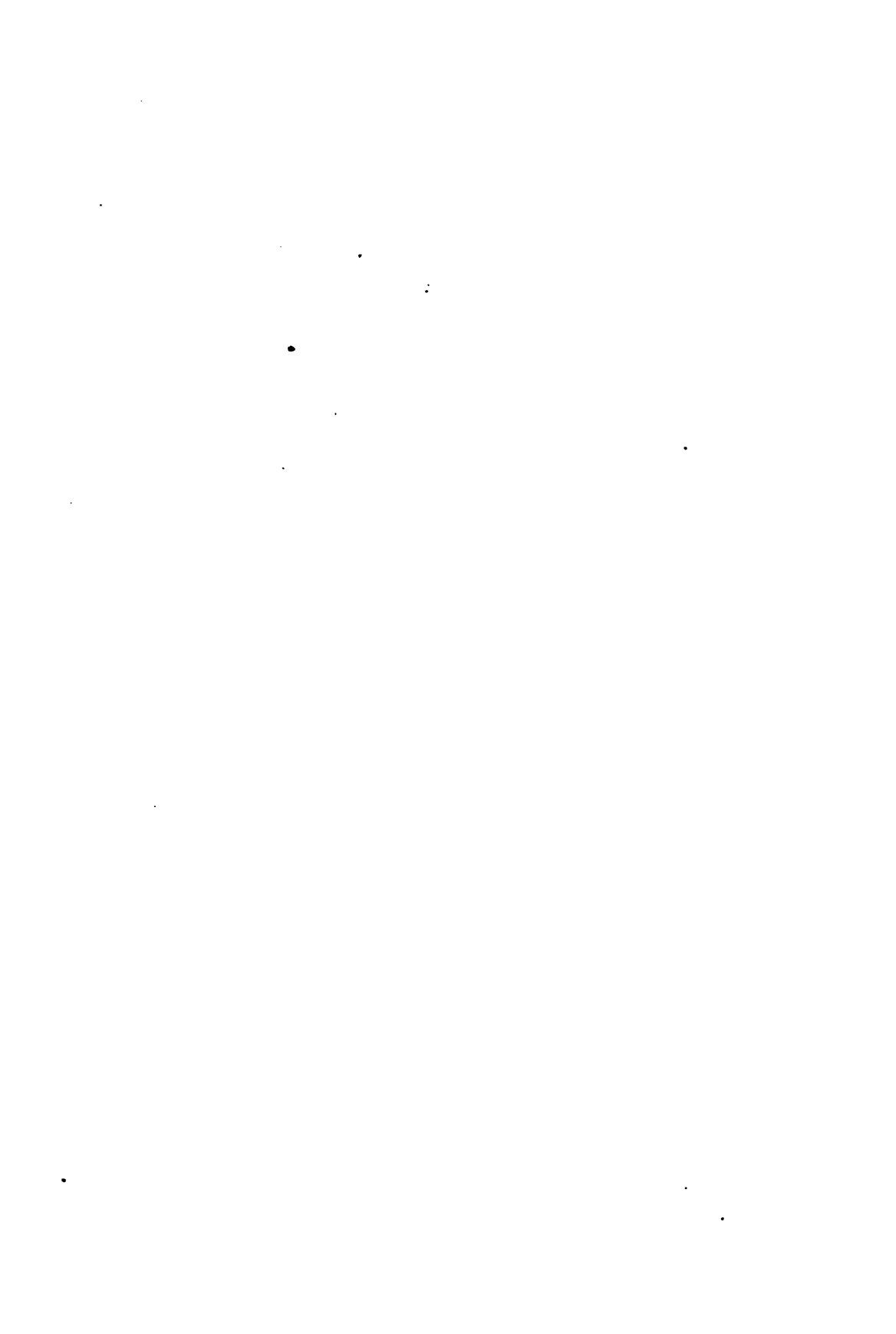
In some two or three instances in the preparation of this volume it has occurred that opinions of the Court of Civil Appeals are published notwithstanding publication of decisions of the Supreme Court in the same cases. This was occasioned by the length of time elapsing between the date of decisions by the Supreme Court and the filing of the opinion by that tribunal, leading to the assumption that no opinion would be filed. This is, of course, not true as to the case of *Harris v. Trust Co.*, 678. That opinion was inserted at the earnest and repeated solicitation of many lawyers.

There are to be found in this volume a few cases not removed to the Supreme Court. We are convinced that no apology is needed for their insertion. They will be found useful; and sometime in future they will be found of value in the search for the authoritative announcement of what the law is in Tennessee. They will certainly be given preference over foreign adjudications; at least they should be.

The publishers report sufficient demand to warrant the continuance of this series.

JOSEPH C. HIGGINS,

Fayetteville, December 26, 1915.



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LEADING CASES
ARGUED AND DETERMINED
IN THE
COURT OF CIVIL APPEALS
OF THE
STATE OF TENNESSEE

GEORGE S. JOHNSON ET AL. V. C. N. COWDEN.

Affirmed by the Supreme Court at Nashville, 1914.

1. NUISANCE PRODUCED BY NOISE.

Under certain circumstances the production of mere noise, if continuous, loud and positively disagreeable, may in law amount to a nuisance. The facts of each case must determine.

2. SAME. *Liability of one tenant of office building to another tenant.*

An occupant of a suite of rooms in an office building may be held liable in damages to the occupant of other rooms in the building for a nuisance created by perpetual jarring and disagreeable noise-making such as renders the occupancy of adjoining rooms uncomfortable.

3. SAME. *Liability of landlord jointly with tenant.*

Ordinarily a landlord is not liable for a nuisance created or carried on by his tenant. But if the nuisance arises from the necessary operation or use of the premises let to the tenant, the landlord is jointly liable with the tenant.

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4. SAME. *Offer to purchase lease of objecting tenant.*

It is no defense to such action that the landlord or the nuisance-making tenant is willing to purchase the objecting tenant's lease and relieve him of liability for rent.

5. SAME. *Increase of business of complaining tenant.*

Nor is it any defense that the complaining tenants' business is constantly increasing in volume.

FROM DAVIDSON COUNTY.

Appeal in error from the Third Circuit Court of Davidson County. G. N. TILLMAN, Judge.

STOKES & STOKES for Plaintiffs in Error.

W. C. CHERRY and GARLAND S. MOORE for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS was a suit for damages brought by the defendant in error, C. N. Cowden, against the plaintiffs in error for the creation of an alleged nuisance.

It was tried before the Circuit Judge without the intervention of a jury, who rendered judgment in favor of the defendant in error, Cowden, and against the plaintiffs in error for the sum of \$300.00 and costs of suit. The plaintiffs in error moved for a new trial, and the same having been overruled, they perfected an appeal to this Court, and have assigned errors.

Upon the trial in the Court below the trial Judge was requested to make and file a written finding of facts in the case, which he did, and the same is made a part of

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the record coming to this Court. After the filing of the original finding of facts by the trial Judge, plaintiffs in error filed objections thereto and asked for an additional finding of facts, and in response to this request the Court did find and file additional facts, which are also made a part of the record in this Court.

By the first assignment of error it is insisted by the plaintiff in error that the facts found by the trial Judge in both his original and supplemental finding of facts did not establish the alleged nuisance, and did not warrant judgment for any amount against plaintiffs in error.

The facts, as found by the trial Judge, disclose that prior to September 26, 1912, defendant in error, a physician, was a tenant in the Eve building, which is located on Church Street, in the city of Nashville, and is owned by the plaintiffs in error, Drs. Duncan and Paul F. Eve, having rented rooms from another tenant with the consent of the plaintiffs in error, Drs. Eve. On September 26, 1912, Drs. Eve rented a portion of said building on the fourth floor to the plaintiff in error, George S. Johnson Company. George S. Johnson Company was a manufacturer of optical goods, and especially lenses used in spectacles or glasses for the eye.

On January 1, 1913, defendant in error rented his offices, which were on the third floor directly under the offices occupied by the defendant Johnson Company, and in which Johnson Company had installed considerable machinery, consisting of motors, pulleys, shaftings, machines and grinding stones used in the conduct of its business. The room in which this machinery was installed by Johnson Company, in size, was about 12 by 15 feet. The other rooms occupied by Johnson Company were used for storage and the reception of customers and for the business generally. The business conducted by defendant

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Johnson Company, when operating their machinery, produced vibrations and a buzzing, grinding noise, which was felt and heard in the offices of the defendant in error, and was annoying and discomforting to him and his patients; that this noise and vibrations were continuous when said machinery was in operation, which was practically throughout each day of the week except Sunday; that the machinery was usually started at 8 o'clock in the morning; shut down at 12 o'clock; would begin at 1 o'clock, and be shut down at 5.30 o'clock in the afternoons, and sometimes, under press of business, the machinery was operated at night; that the noise from said machinery was so pronounced and loud that it often became necessary for defendant in error to raise his voice above the natural pitch in talking with his patients; that the noise and vibrations often made his patients nervous; that the successful or satisfactory use of the stethoscope, which was often necessary in the examinations of patients, was often rendered difficult, and sometimes impossible on account of said noise; that the noise and vibrations from the running machinery interfered with and hindered the defendant in error in his investigations and study; that efforts had been made by Johnson Company to so operate its machinery in said offices as to avoid creating said noise and vibrations, but that said efforts had been unsuccessful; that said noise and vibrations did not arise from an improper or negligent use of the premises by Johnson Company, but in the necessary, ordinary and careful operation of the machinery necessary in the conduct of its business.

The Court further found that the noise and vibrations produced by the operation of the machinery in the offices occupied by George S. Johnson Company immediately

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above the offices occupied by the defendant in error, impaired and lessened the usable value of defendant in error's offices.

As to the noise and vibrations produced by the operation of the machinery in the offices of the defendant, George S. Johnson Company, Dr. Cowden testified that there was a variety of sounds emanating from the running machinery; that when the machinery would be started in the morning, there would be a humming sound, and later on, when they would begin to grind and polish the lenses, the sounds emanating from said operations would sound like the running of a saw mill without any lumber in it; that the noise produced by this work would become intolerable; that it was greater at times than it was at others; that when all the machinery was grinding he had to talk loud to his patients to make them hear him; that it was frequently the case that patients would become very nervous under the noise; that it materially interfered with his use of the stethoscope in the examination of the heart and lungs; that sometimes an examination with the stethoscope was rendered impossible, and frequently unsatisfactory; that said noise interfered with his talking over the telephone in his office, and interfered with his efforts to read and study; that he was a man of good physical health, and not of a nervous temperament; but after being in his office all day with the machinery of the defendant George S. Johnson Company running over his head, he felt like he could hear the noise produced by said machinery for an hour after he left his office.

His testimony as to the amount of noise produced by said machinery and the operations carried on in the office of George S. Johnson Company is corroborated by other witnesses whose testimony appear in the record.

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Dr. C. E. Brush testified that it was absolutely impossible to make a satisfactory stethoscopic examination while the machinery was in operation in Dr. Cowden's middle room; that there were times when a fairly good examination could be made in the rear room of his office; but at times, when the noise would be so great, it would interfere with the stethoscopic examination in the rear room. Other physicians introduced in behalf of the defendant in error testified to substantially the same facts. It is unnecessary to state in detail all the evidence contained in the record upon this question.

It suffices to say that the plaintiffs in error offered evidence tending to show that the noise and vibrations produced by the running machinery and operations carried on by the defendant, George S. Johnson Company, were not of such character and volume as to materially interfere with the defendant in error's office duties, or to render his condition uncomfortable and annoying. This evidence, however, is more or less negative in its character.

We are of opinion that there is much material evidence in the record to support the findings of the trial Judge, to the effect that the noise and vibrations produced by the operations George S. Johnson Company were of such a character and volume as to materially interfere with defendant in error's professional duties while in his office; that they materially disturbed and annoyed him, as well as his patients, and thereby seriously affected and impaired the usable value of his offices, and the comfortable enjoyment of the same.

"A private nuisance is one that affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public." *Am. & Eng. Ency. of Law* (2nd Ed.), Vol. 21, 682.

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"An act or use of property to constitute a nuisance must violate some legal right either public or private and must work some material annoyances, inconvenience, or injury, either actual or implied from the invasion of the right. The mere fact that it is unpleasant, annoying, or unsightly will not be sufficient." Am. & Eng. Ency. of Law (2nd Ed.), Vol. 21, 686.

"The criterion for determining whether or not a particular use of property is a nuisance is its effect upon persons of ordinary health and sensibilities, and ordinary modes of living, and not upon those who, on the one hand, are morbid or fastidious or peculiarly susceptible to the thing complained of, or, on the other hand, are unusually insensible thereto." Am. & Eng. Ency. of Law (2nd Ed.), Vol. 21, 687.

"It is now well stated that mere noise alone may be a nuisance to those affected thereby, when it is maliciously made, or when, because of its volume, character, proximity, or unreasonableness, it causes material distress, discomfort, or injury." Am. & Eng. Ency. of Law (2nd Ed.), Vol. 21, 695.

In *Terminal v. Jelllyett*, 114 Tenn., 402, the Court said that the discomfort and in convenience produced by the alleged nuisance must proceed to such an extent as to injure the usable, rental or permanent value of the property of the plaintiff, before the Court will award damages; that it must amount, to some extent, to the taking of the value of the property, either temporary or permanent, and depriving the owner thereof.

The trial Judge found that the discomfort and inconvenience caused by the defendant in error by the operation of the machinery materially interfered with the performance of his professional duties, and impaired the usable value and enjoyment of his office. In other words,

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that material injury had resulted to the defendant in error by reason of the alleged nuisance, and there is ample evidence in the record to support the findings of the trial Judge. This being true, we are of opinion that the first and second assignments of error must be overruled.

By the third assignment it is insisted that the trial Judge committed error in not responding to defendants' request for additional finding of facts to the effect that the offices occupied by defendant in error could be rented without difficulty by the landlords, at a rental larger than that paid by defendant in error, to reputable physicians who were willing to take them and raise no complaint regarding the alleged noise.

We are of opinion that this fact was entirely immaterial. Defendant in error had rented the offices for a definite period, and was entitled to their possession, use and enjoyment. And what other persons may have been willing to give for them could not affect his rights in the premises.

By the fourth assignment it is insisted that the Court erred in fixing October, 1912, as the date from which the defendant in error was entitled to recover damages.

It is insisted that the proof in the record, and the facts found by the Court show that plaintiff did not become a tenant of the landlords in October, 1912, but on January 1, 1913.

The proof shows that defendant in error, with the consent of the landlords, Drs. Eve, subleased the premises from Dr. Roberts prior to October, 1912, and the fact that he did not lease direct from the landlords until January 1, 1913, is immaterial. He was occupying the premises with the consent of the landlords, and they were bound to protect him from the alleged nuisance carried on by another tenant in the building. It is shown that Sep-

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tember 26, 1912, is the date upon which said nuisance began. The Court allowed the defendant in error damages from October, 1912, to the 30th of April, 1913, the date of the bringing of the suit.

By the sixth assignment it is insisted that the Court erred in finding as a fact that the increase in defendant in error's business after he moved into the Eve building was not due to the location, but to defendant in error's efforts to build up his practice. It is insisted that there is no evidence in the record to support such a finding.

We are of opinion that this question was also immaterial, and could not in any way affect the merits of the case. However, it was testified to by the defendant in error himself that the increase in his business since moving from Eighth Avenue to the Eve building was due to his efforts to build up a practice.

By the sixth and last assignment it is insisted that the Court erred in holding that the landlords, Drs. Eve, were jointly liable with the defendant, George S. Johnson Company, for the alleged nuisance.

It is insisted that there is no fact found by the Court, nor evidence in the record, showing that the landlords knew or had reason to believe that Johnson Company intended to use the premises in such a way as to create a nuisance.

In the case of *Terminal Company v. Jacobs*, 109 Tenn., 736, it was held that where the nuisance complained of arises from an improper use of the premises by the tenant, the landlord is not liable; but where the nuisance arises from the necessary and proper use of the premises, the landlord is jointly liable with the tenant.

The proof shows in the suit at bar that the operation of the machinery by the defendant, George S. Johnson Company, is necessary in the conduct of its business. The

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proof fails to show any improper operation of the machinery by said company. Upon the other hand, the evidence tends to show that they have endeavored to correct the noise and vibrations produced by said machinery, but have been unsuccessful in their efforts to do so.

We are of opinion, therefore, that the landlords, Drs. Eve, are jointly liable with the defendant, George S. Johnson Company, and the trial Judge was correct in so holding.

It results that we find no error in the judgment of the Court below, and it is affirmed with Costs.

C. P. WILLIAMS V. CHATTANOOGA IRON WORKS ET AL.

Affirmed by the Supreme Court at Jackson, 1915.

1. PHYSICAL EXAMINATION. *Power to order.*

Circuit Judges in this State have the power in proper cases to order physical examination of a plaintiff suing for personal injuries.

2. SAME. *Discretion. Review.*

The exertion of this power is discretionary with trial Judges. But that discretion when exercised either for or against a plaintiff, and also the method of its execution, are subject to review by appellate courts.

3. SAME. *Enforcement.*

The Courts have the power to penalize the refusal to comply with a proper order in such case by dismissing the suit of the plaintiff.

4. SAME. *Proper practice. Affidavit.*

Good practice suggests that the application for a physical examination be preceded by an affidavit setting forth the reasons or

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necessity for a physical examination, and it should be averred that plaintiff had been requested to submit, and had declined.

5. *SAME. Time, place and conditions.*

This application should be made before the case is called for trial, but not too long anterior thereto. The place of examination should be specified by the Court, and should be at such place or such proximity to the Court as that the plaintiff may appeal to the Court for protection. The extent to which the examination should go should also be prescribed, and plaintiff's counsel and physician should also be permitted to be present.

FROM SHELBY COUNTY.

Appeal in error from the Third Division of the Shelby Circuit Court. A. B. PITTMAN, Judge.

ISRAEL PERES and R. E. KING for Plaintiff in Error.

BROWN & ANDERSON for Defendants in error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

WILLIAMS shall be designated in this opinion as the plaintiff. Defendants error shall be called defendants simply. Williams brought this suit against defendants for damages for injuries claimed to have been sustained while in their service. The wrongs complained of were those occasioned by the flying of a piece of steel into one of his eyes, permanently injuring it and causing a diminution of seeing power in the other eye because of sympathy with the one that was hurt.

He filed his declaration setting forth the time, place and manner in which he was injured and charged that his

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employers were guilty of negligence. He described his injuries as consisting of the permanent loss of sight of one eye and weakening of the power of vision of the other. Defendants in terposed the pleas of a general issue, contributory negligence and independent contractor. These pleas were filed in September, 1914.

On a day in November, 1914, defendants appeared in Court and filed a motion or request that the Court order a physical examination of the plaintiff by expert physicians, to be appointed by the Court, for the purpose of ascertaining whether plaintiff was injured as he alleged, and if so, to what extent. In this motion defendants undertook to show that the injuries were latent and not perceptible except to experts, and that the ends of justice required that defendants be advised by physical examination in advance to what extent the eyes or the sight of plaintiff had been injured; and defendants offered to pay the fees that might be charged by the selected experts. Plaintiff resisted this motion for reasons which need not be now stated. Upon the succeeding day of the term the Court sustained defendants' motion and made a peremptory order upon plaintiff that he present himself at the office of one Dr. Ellett, in the Exchange Building, in the city of Memphis, and submit himself to such physical examination as said physician might deem necessary.

Plaintiff was advised by his counsel not to submit to the examination offered, being of the opinion that the Court did not in the first place have the power to make the order, and secondly, that the order was improperly entered, conceding the authority of the Court to make it. The Judge was of the opinion that this refusal disentitled the plaintiff to proceed with his litigation and directed a dismissal of his suit. He has appealed and assigned such errors as raised two questions of prime importance. The

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first question is as to whether the trial Judge had legal warrant for commanding the plaintiff to submit to a physical examination at the peril of the dismissal of his suit in case of refusal. The second question is whether the Judge properly exercised this power and discretion in this instance if the Court should reach the conclusion that he was clothed with this authority.

We wish to commend at the outset the splendid brief filed by learned counsel for plaintiff in opposition to the view that trial Judges have the power to compel a litigant to submit to a physical examination. It exhausts the subject, and leaves very little that could be said to sustain the opposing contention. But notwithstanding the earnestness and learning displayed, we remain unshaken in the views expressed by Mr. Justice Moore, in the case of *Railroad v. Koonce*, 4 Tenn. C. C. A., 1. Our learned brother announced in that case that this Court was of the opinion that trial Judges in Tennessee had this power with respect to litigants in personal injury cases, and that at proper junctures it might be called forth by defendants. We could rest content with the conclusions there announced, but owing to the skill and ability with which this position has been assailed, we have felt it incumbent upon us to reinvestigate the question. While we have not read every authority bearing upon the subject, we have examined and reexamined a vast number of decisions sustaining and opposing the existence of this power. We have especially read the leading cases which deny this power, such as *Railroad v. Botsford*, 141 U. S., 250; *Stack v. Railroad*, 177 Mass., 155, 52 L. R. A., 328; *May v. Railroad*, 70 L. R. A., 111 (Mon.); *Austin v. Railroad*, 64 L. R. A., 494 (Tex.); *McGuigan v. Railroad*, 14 L. R. A., 466 (N. Y.).

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Notwithstanding the cogency of the reasoning of the eminent Judges who decided these cases, we are convinced that the sounder, safer and better rule for the ascertainment of truth and the administration of justice is to adjudge that this power belongs to a limited extent to common law Courts in the trial of personal injury cases. The dissenting opinion of Justice Brewer in the *Botsford case* gave an almost irresistible impetus to the doctrine, and it can be safely asserted that this rule prevails in more than three-fourths of the jurisdictions of the American union. While this is ostensibly an advanced step; while it appears to be a radical innovation and an unconstitutional or unwarranted interference with private right, we have no hesitancy in saying that it is a natural unfoldment and practical application of fundamental principles and powers. It is not, as Justice Holmes states, the exertion of power not justified by the natural development of juristic principles. Courts proceeding according to the course of the common law have always been supposed to be concerned with the ascertainment of truth and prevention of fraud. Different ages, different species of litigation and ingenious devices for circumventing others, demand the ascertainment of fitting and corresponding methods of arriving at truth, and no litigant who appeals to a tribunal for the redress of grievances can conscientiously assert his right to withhold or conceal any fact which will enlighten the arbitrator of the differences.

That the Courts of England have not exerted this power in common law cases is not conclusive that this power does not exist. This argument is not strongly persuasive in a country that has been striving to import into common law Courts the principles and powers of a Court of equity. Broad-minded jurists have never been able to appreciate the reason why a Chancellor might exert certain powers

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for the purpose of ascertaining the truth while a common law Judge must sit with his arms tied and eyes blinded. From time immemorial ecclesiastical courts and courts of equity have assumed the power to compel an examination of parties suing for a divorce upon the ground of impotency. And in England, even in common law Courts, Judges have from the beginning asserted the authority to compel a widow to submit to an examination for the purpose of preventing imposition by her upon the rightful heir of her husband. Again, common law Judges have always felt constrained to require female prisoners to submit to an examination, to the end that the Courts be not imposed upon by false representations as to their condition. Nobody ever controverted these rights or powers. It has been universally conceded that this power is necessary to prevent fraud. There is nothing in American constitutional limitations which denies the existence of this power and this principle. Nor are we convinced that there is any sound constitutional or common law reason for curbing the natural enlargement of this power to dimensions commensurate with the present age.

The right of privacy can certainly be waived. There is not any material or juristic difference between the exposing of a part of the body to the gaze of those habituated to this practice, and the *verbal* exhibition of it to a Court and a jury. We are unable to see why a man may be permitted to conceal a part of his body and discourse to a jury about it when the removal of his clothing and exhibiting of his person would simply make more vivid the representation of his injuries.

We are extending this opinion by elaborating views which could be treated as more aptly expressed or impliedly assumed by abler courts. But we always prefer to assign some reasons of our own for our decisions upon

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comparatively new questions rather than sheepishly follow the utterances of others. It is always well, however, after arriving at a conclusion, to ascertain whether or not the views of eminent authorities are in harmony therewith. We find the following, among a vast number of utterances of jurists of high ability, in accord: *Manufacturing Co. v. Schoeninger*, 15 L. R. A. N. S., 63, notes; notes to *Larson v. Salt Lake City*, 23 L. R. A. N. S., 462; *South Bend v. Turner*, 54 L. R. A., 398; *Railroad v. Childress*, 3 L. R. A., 808; *Railroad v. Hill*, 9 L. R. A. (Ala.); *Railroad v. Palmore*, 64 L. R. A., 90; *Railroad v. Finlayson*, 49 Am. R., 724; *Johnson v. Railroad*, 150 Cal., 535; *Graves v. Battle Creek*, 19 L. R. A., 641; *Wanek v. City of Winona*, 46 L. R. A., 448. To this must be added the endorsement of Judge Thompson and Mr. Watson.

But singularly enough, we have discovered that the Supreme Court of Tennessee, speaking through two of its former able Judges, virtually recognized this power and gave it sanction. We refer to the cases of *Lipes & Gamble v. State*, 15 Lea, 124, and *Railroad v. Ayres*, 16 Lea, 724. In the first case named, Judge Freeman boldly asserted that a trial Judge should compel a defendant, even in a criminal case, to submit to a physical examination to prevent a perpetration of a fraud upon the Court. In the latter decision Judge Cooper gave utterance to his conviction that a physical examination was one of the means at hand of ascertaining the truth respecting the bodily condition of a litigant rule.

The best evidence is one of the most salutary regulations that was ever devised by the Courts, and its spirit requires the exhibition of the injured body of anyone who claims to be suffering from physical hurt. It is not logical or consistent to require a Court to speculate as to

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actual conditions when the least bit of frankness upon the part of a litigant would bring absolute certitude.

But it is earnestly contended by learned counsel that no Court can penalize a plaintiff by dismissing his suit in case he refused to submit to an examination.

If it be granted that the power to compel submission exists, the logical development of this authority demands that it be made effectual by repelling the litigant. This method of exerting the authority can be justified by the application of a few immutable principles which are this day as pertinent in Courts of law as well as of those of equity. Every litigant should appear before the Court with clean hands and a willingness to disclose everything which in equity and good conscience should be opened to his adversary. Again, fraud vitiates everything, and it is not a far stretch to say that a litigant who wilfully refuses to confirm his doubted word as to the extent of his injuries is guilty of fraud. Moreover, fraud cannot be made the basis of any right, nor can a Court of justice be called upon to adjudicate favorably a claim founded upon or tainted with fraud. Again, all Courts assume the power to withhold their aid from parties who are shamming or relying upon false pleas. These maxims, always luminaries in cases of doubt, furnish sufficient justification for a dismissal of an action when the plaintiff refuses without sufficient cause to obey an order of the Court to submit to an examination.

But it must not be overlooked that this is the recognition of a far-reaching power. Nor must it be denied that it is going to result in some timorous and modest ones suffering injuries without redress. But upon the whole, we are convinced that it will result in the more efficient administration of justice and in the reduction of the number of false, fraudulent and unfounded claims for indemnity.

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And yet the Courts must be exceedingly careful that it be not made the instrument of vexation and harassment, and that it be not resorted to as the means of extorting facts of no relevancy to the matter under investigation. Nor must this authority be exerted except where the circumstances almost imperatively demand it as a means of ascertaining the truth, and then only when the examination can be conducted without serious pain or peril to the injured one.

We announced in the *Koonce case* that the action of a Circuit Judge in ordering an examination was subject to review, notwithstanding the recognition that the exertion of this power was in his discretion. We reaffirm this proposition, with the amplyfying statement that the circumstances surrounding every order of this nature will be carefully scrutinized in the appellate Court, to the end that this vast power be not abused nor extended beyond the demands of justice.

We cannot within the limits of one opinion prescribe all the conditions and directions which must be observed, nor when or under what circumstances this order may or may not be made by the trial Court. We shall be forced to deal with these matters from time to time as cases arise, contenting ourselves with the general statement that trial Judges must exert this authority with exceeding great care and circumspection.

It must not be assumed that this power may be brought into requisition in any and every personal injury case whenever a defendant wishes it. Nor can a defendant dictate the times and methods of an examination commanded. Nor must it be overlooked that plaintiffs cannot be required to yield their right of privacy and per-

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sonal security except for juridical purposes, and then only under the supervision and control and protecting care of a judicial functionary.

In the second contention made by learned counsel for plaintiff it is said that the Court did not properly exercise his discretion or exert his power if it be granted that Courts can compel submission to physical examination. To this contention we readily yield our assent. We unequivocally assert that the trial Court did not in this instance make such orders and give such directions as he should have prescribed, and that plaintiff is not to be penalized by dismissal of his suit because of his refusal to put himself within the power of the physician named by the Court. We shall briefly set down those points wherein the Court erred in entering the order in this case.

Our first observation is that plaintiff is constrained to leave the environs of the Court and go to a private office in a distant part of the city, without the protecting presence of any judicial officer or agent. An indispensable incident to an order of this kind is the prescription of such times and places as that the party can be protected by an immediate appeal to the Court. We decline to sanction an order that the litigant go to a distant part of a city or county and there subject himself to an examination. We must not be understood as laying down the proposition that the examination must be in the courtroom or even in the courthouse; but we distinctly affirm that the Court cannot arbitrarily compel the appearance of the plaintiff at a place far removed from the precincts of the Court. If this might be done in a case where the point is a mile distant, it might be exerted to compel a plaintiff to go several miles. All the authorities which sanction this power explicitly state that it must be hedged about with such restrictions as to make it a judicial act, and

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that the examination must be conducted under the virtual supervision of the judicial eye.

Again, the order in this case is subject to criticism, in that it substitutes the judgment and discretion of Dr. Ellett with respect to the extent, method, and purpose of examination for that of the Judge. It is not sufficient to say that the use of the terms, "reasonable physical examination," is sufficient limitation upon the powers of the expert. It is not. This referee is as it were the arbiter of the reasonableness of the examination. The Court should have prescribed what should be done by the expert, coupled with the condition that the life of plaintiff be not endangered and that he be not subject to serious physical or mental pain, and that the examination be confined solely to the examination of his eyes or such sympathetic organs as are recognized as affecting the powers of vision.

We also note that the expert is impliedly invested with authority to exclude everyone from his office during the examination. Whether he would exert this power is not a question at issue. The juristic objection is that plaintiff is not safeguarded therefrom.

Again, there is no provision that be attended by his counsel or by his family physician or by an expert employed by him, if it be conceded that Dr. Ellett would dare not exclude anyone. As this power is to be exerted upon rare occasions and under extraordinary circumstances, we prescribe as one of the conditions the right of the plaintiff to have his counsel and his physician present during the examination. We are inclined to the view that this power to compel physical examination in secret and without the presence of counsel would be so inconsistent with the inalienable rights of the individual and so abhorrent to the universal sense of protective instinct as that it would have to be denied. Hence, our reason for laying down

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the proposition that plaintiff must be given the right to take with him to the examining room his own counsel and his own physician. He must not be subjected to secret examinations of experts who might be influenced to deny him justice. *Railroad v. Hill*, 9 L. R. A., 808; *McGovern v. Hope*, 63 N. J. L., 76; *Railroad v. Finlayson*, *supra*; *Lane v. Railroad*, 46 L. R. A., 163; *Johnson v. Railroad*, 150 Cal., 535.

We do not feel called upon to determine in this case whether defendants should have made an affidavit setting forth the necessity of a physical examination. But as the occasion is appropriate, we do assert, after an examination of numerous authorities, and doing some independent thinking, that a defendant desiring to call forth this power should file an affidavit setting forth the circumstances and averring the necessity of such examination as the means of ascertaining the truth, and stating further that this is the only efficient means of bringing the true conditions to light. There should also be shown a request made of the plaintiff before the application to submit to an examination and refusal by him so to do. *Railroad v. Childress*, *supra*.

The judgment of the lower Court dismissing plaintiff's action is reversed and vacated, and the cause is remanded with direction that it be reinstated and proceeded with in orderly course. Whether defendants may renew successfully their application for an order to compel physical examination is a question which we are not called upon to determine. Defendants will pay the costs of this Court.

With respect to the time of ordering an examination, we remark that it is appropriate that this be commanded anterior to the day of trial, but that it should not precede the trial by a very great length of time, for the reason that conditions might be quite different.

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C., N. O. & T. P. RAILROAD COMPANY V. LINDA ABBOTT.

Writ of certiorari denied by Supreme Court.

(Knoxville. September Term, 1914.)

1. EVIDENCE. *Positive and negative.*

Evidence with respect to the blowing or not blowing of an engine whistle or ringing of bell, though in form negative, is not necessarily so in substance. While negative in form, it may be positive in its nature, as where a witness positively asserts that an alleged occurrence did not take place.

2. SAME. *Weight of evidence. Destruction of negative by positive evidence.*

The rule that positive evidence neutralizes and destroys negative evidence is not of universal application. The comparative weight and value of the two kinds must generally be submitted to the jury without instructions that the one species is entitled to greater weight than the other, unless the evidence called negative is purely of that nature, that is, the result of inattention.

3. RAILROADS. *Statutory precautions. Ringing bell.*

It is not error for the Court instructing the jury in a statutory precaution case to leave it to the jury to determine whether the sounding of the bell was or would have been one of the means of preventing an accident.

4. NEW TRIAL. *Newly discovered evidence.*

The trial Judge was not in error in refusing to grant a new trial because of alleged newly discovered evidence if the affidavit in support failed to disclose diligence and failed to aver that the evidence was material and would probably have changed the result. Nor should new trials be granted upon this ground if purported evidence is set out in the affidavit of the party's attorney alone, unaccompanied by affidavits of the proposed witnesses.

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5. SAME.

An affidavit which discloses the fact that the attorneys became aware during the trial of what an accessible witness knew and fails to show any reason for not having produced the witness during the trial discloses a state of facts disentitling the party to a new trial.

FROM SCOTT COUNTY.

Appeal in error from the Circuit Court of Scott County.
ZEN HICKS, Judge.

H. H. CARR for Plaintiff in Error.

YORK & PEMBERTON for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS is a suit by Melinda Abbott to recover damages from the Cincinnati, New Orleans & Texas Pacific Railway Company for personal injuries received by her, resulting from the alleged negligence of the railway company in running one of its trains against her.

The declaration filed in the case contains three counts. Without going into details, their substance is, that on January 31, the railway company in Scott County unlawfully, carelessly, recklessly, and negligently ran its engines and cars upon and over defendant in error near Bear Creek Junction between Oneida and Winfield in Scott County, Tenn., and near a whistle post on its line of railway, the result of which was that she was wounded, bruised, mangled, and injured in her hips, legs, arms, back, side, and one of her legs was broken below her hip,

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which injuries caused her great pain, mental and physical, and to spend much money for medicine and medical attention, and which permanently crippled her; that on the day before stated, and at and near a place where people cross the line of railway, it unlawfully, etc., ran its engine and cars upon and against her without having the engineer, fireman, or some other person on the locomotive on the lookout ahead, or without sounding the alarm whistle, or putting down the brakes, or without employing any means whatever to stop the train and prevent the accident, whereby she was wounded and bruised, etc., as before stated.

The other count of the declaration alleged that the railway company was a common carrier of freights and passengers for hire, and that on the day stated near the station of the Company aforesaid it negligently, recklessly, etc., ran and operated its train, so that while defendant in error was attempting to cross its tracks at a place where it was customary for people on foot to cross its tracks, and at which place the company prepared a crossing for people to cross its tracks, and which place was so recognized by it and the public for a long time prior to the injuries inflicted upon her, it negligently, etc., and at a reckless and exceedingly high rate of speed, ran its engine, cars, etc., against plaintiff, whereby she was wounded, crippled, etc., as aforesaid, and that she was without fault, and had no warning of the approach of the train, and that had it not been for the negligence and carelessness of the railway company as aforesaid, her injuries would not have been received, and that its negligence was the proximate cause of her injuries.

She puts her damages at three thousand dollars.

The railway company interposed the plea of "not guilty."

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The case was heard before the Court and jury below in the latter part of February, 1914, and resulted in a verdict in favor of defendant in error against the railway company for \$1,850.00. The motion of the Company for a new trial was overruled and it appealed in error to this Court, the Court below having entered judgment against it upon the verdict of the jury. It assigns the following errors, in substance:

1. No evidence to support the verdict of the jury.
2. Insufficient evidence to support the verdict of the jury.
3. The great weight of the evidence is against the verdict of the jury.
4. The Court erred in overruling its motion for a direct verdict made by it at the close of all the evidence.
5. The Court was in error in refusing to charge, without modification, the following request presented by it. "I ask your Honor to say to the jury that the ringing of the bell under the circumstances shown in this case upon all the proof is not a part of the statutory duties required of a railway company, and the jury should not look to this fact to determine whether the statute had been violated. Such matters could only be looked to under the rules of the common law."
6. The Court erred in stating the following to the jury in response to the request above set out: "With reference to that, I instruct you, gentlemen of the jury, that the statute in express terms does not specifically require the railroad company to ring the bell after an obstruction appears on the track, but the statute does require the company in general terms to sound the alarm whistle, put down the brakes, and use every means to stop the train and prevent the accident, and so I instruct you that a case might arise where the ringing of the bell would be

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one of the means whereby an injury might be avoided; but now the facts are with reference to this particular matter, that is for the jury to determine."

7. The verdict of the jury is so excessive as to evince prejudice, passion and caprice on their part.

8. Since the trial of the case it has discovered new very material evidence as shown by the affidavit of Horace M. Carr filed in the case on this date, which evidence will have a material effect and bearing on the result of the case.

We need not waste any time over the second and third assignments of error. The first and fourth assignments raise, in the practical disposition of the case, the same question, and in its proper settlement an examination of all the evidence in the record is demanded. The deposition of Mrs. Abbott was taken. She is the widow of Tom Abbott, who died about two years before her deposition was given. She was forty-five years old in August, 1913. She had eight living children, the youngest three and a half years old. She had four under twelve years of age. She lived south of Bear Junction and west of the railroad of plaintiff in error in Scott County.

On the morning of January 31, 1913, she was at the home of Link Strunk, who lived between Winfield and Oneida, north of Bear Creek Junction in Scott County, close to, but on the west side of, the tracks of the plaintiff in error.

On the morning of January 31, 1913, about half after ten o'clock, she left the house of Link Strunk to go to the house of Melt Strunk on the east side of the railroad.

She testified as follows: "In going from Link Strunk's to Melt Strunk's I traveled the railroad between the tracks. It was the way for me to go—it was a nearer way up there. I was struck by the train on the east side

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of the railroad just north of Melt Strunk's house. It was a short distance from the south end of the cut close to a little drain just north of it. It was close to a culvert where the train goes under it. I was traveling on the east main track at the time I was struck. The train that struck me was going north and I was going south, I cannot say exactly how far I had traveled on this track, but some few steps—I can't tell exactly how many steps. I had been walking between the tracks and moved on across on the east track on the end on the crossties. I had traveled on this eastern track some few steps, I don't know how many. I can't tell how long I had been walking on the end of the ties on the east main line, exactly, but some five or ten minutes, maybe.

This question was asked her:

"Q. Please say whether or not you were upon the railroad of the defendant at and for some time before you were hurt?

"A. If I had not been on the railroad I would not have got hurt. I was on it, you know. I had been on it some time—maybe, ten or fifteen minutes."

She further testified: "I could have been seen by the engineer a right smart piece, about the end of the cut or further. It was the engine of that train that hurt me. The train was going north and I was going south, we were both on the same track."

These questions were asked her and she answered as follows:

"Q. Please say whether or not the whistle on the train that struck you was sounded before and shortly before it hit you, or at any time?

"A. It wasn't blowed at all. If it did, I didn't hear it. It never blowed.

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"Q. Please say whether or not the whistle on the train that struck you was sounded or blown before the train hit you?

"A. It wasn't blowed; it wasn't sounded.

"Q. Please say whether or not the bell on the train that struck you was rung before the train hit you?

"A. It was not."

She testified that the train stopped after it hit her; that her right shoulder was hurt; that her right leg above the knee was broken; that she was injured on her hips and bruised; that she had suffered a lot in her head; that the bones of her leg above the knee had not united or grown together; that she did not sleep sound; that she had been treated by Dr. Sevier and Dr. West; that she had done all she could to get well; that the bones in her leg are apart; that sometimes they passed each other or slipped by each other; that she washed for a living before she was hurt; that the Monday before she was hurt she made fifty cents, on Tuesday, seventy-five cents, and Wednesday and Thursday seventy-five cents each; that she was wholly disabled as the result of her injuries to do any labor; she has to have some one with her all the time to assist her; that she has to spend her time in bed; that she has never walked a step since her injuries; that she had known this railroad for twenty-five years; that she and other people traveled upon it by foot; that it was her nearest way to go to the postoffice; that she had seen the section hands and other employes of the railroad when she walked on the railroad; that they never prevented her going upon it and never objected.

She further testified that the men on the train never gave her any warning that the train was approaching; that she had good use of her legs and limbs before; that her

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hearing and eye sight were good before her injuries; that she had never married since her husband's death.

With respect to the injuries of Mrs. Abbott she is practically confirmed and corroborated by Dr. Sevier who waited on her, and by the other evidence introduced on the trial of the cause.

The main battle in this case is as to whether or not the men in charge of the north bound train that struck Mrs. Abbott could have seen her in time before she was struck to sound the alarm whistle, put on the brakes, and comply with the statutory precautions, or any of them, to prevent the accident. We have above copied what Mrs. Abbott said directly bearing upon this question.

It appears from all the evidence that this north bound train was going down grade at the time it struck Mrs. Abbott. A south bound train was passing on the other track about that time and met the north bound train near the place of the accident, and it was going upgrade.

It appears that this northbound train was using one of the very largest engines used by the company, known as the 900 class. He testified that he stood at the place where Mrs. Abbott was injured and looked south, and he thought if two trains were passing a person could see something like eight or nine rails from the fireman's side of the engine, and that a rail is thirty-three feet in length.

Harrison Strunk was examined in the case; is nineteen years of age. He saw her about fifteen minutes, or a half an hour after she was hurt by the train. He was with Cleat Strunk, Arthur Strunk, and Filmore Strunk. He testified that a freight train came down there and stopped right on the crossing on the east track going north. He was asked whether or not, just before that train stopped, and for some little time before that, the alarm whistle on the engine had been blown or the bell rung, and he an-

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swered that he did not know about that, that he did not hear it.

The engineer was asked what he did and what space of time it took to apply the brakes in emergency and sound this alarm whistle, and his answer was that the instant the fireman called his attention, he applied the brakes with one hand and sounded the whistle with the other; that he did this as quick as he possibly could; that he was sitting with his left hand on the brake valve at the time; that is, with his left hand on the brake valve, and that he sounded the alarm whistle with his right hand; that the application of the brakes in emergency has a tendency to stop the train quicker than any other way; that the brakes in emergency is the full braking capacity of the train; that brakes applied in emergency applied to the engine as well as the cars on the train.

He testified that there was a train passing on the south bound track at the point where the accident occurred, and that his recollection was that about two thirds of this south bound train had passed when he saw the lady on the track, or on the end of the ties.

He testified that the south bound train blew the signal at him to give notice that a train was following it; that he did not see the signal on the south bound train, but that it sounded the signal and that he acknowledged it; that these signals were sounded about a train length from where the accident occurred.

He testified that when he first saw the lady she was walking south looking down apparently towards the cross-ties, walking, meeting his engine; that she either had a bonnet or a fascinator on her head; that he applied the brakes at the moment the fireman called his attention and reached for the whistle with his other hand as quick as he could, that he stuck his body out of the window to see

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if he could see; that the brakes were applied before he could see her, and that the whistle sounded about the time he saw her.

George McKinney was examined by the railroad company. He was fireman on the train that struck Mrs. Abbott. He had been working for the company in the capacity of fireman for three years.

He testified that he was on the left hand side of the engine at the time of the accident in the regular fireman's place and was looking out ahead.

He testified that at the time the engine struck Mrs. Abbott there was a train passing on the south line of the road.

He testified that he saw her before she was struck; that he saw her as soon as anyone could have seen her from his side of the engine, and he judged that he was six or seven rail lengths from her when he first saw her, and he hollered to the engineer and told him to apply the brakes; that he said, "Swipe the gauge," and that "Swipe the gauge" in railroad language meant to apply the brakes in emergency and put on all the braking power possible.

He testified in effect that the engineer, as soon as he could, applied the brakes in emergency and sounded the alarm whistle.

Now, this is the testimony with reference to the question as to whether or not the alarm whistle was sounded, and the brakes applied as soon as Mrs. Abbott was seen on the track, or as soon as she ought to have been seen.

The great contention of able counsel of the railroad company is, that the evidence of Mrs. Abbott and her witnesses, that no alarm whistle was sounded and no bell rung on the engine before it hit her, is, when analyzed, purely negative in its character, and, hence, in legal contemplation, amounts to no evidence at all as against the positive evidence of the engineer and fireman on the engine, that

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the alarm whistle was sounded and the bell rung as soon as she was seen on the track or within striking distance of it, and as soon as she could have been seen by a vigilant lookout on the engine.

We recognize the rule, and concede its soundness, that positive evidence, given by a credible witness or witnesses, is not affected by parol negative evidence. In other words, where a witness swears positively that a certain thing was done, or an act occurred, and a raft of others in the vicinity swear that if the thing was done, or the act occurred, they did not notice, or see, or hear it, the evidence of the latter in the determination of rights ought not to have legal weight sufficient to overturn the fact or facts positively testified to by the former, unless at the time the attention of the former was called to the matter. *Railroad v. Ray* (16 Cates), 124 Tenn., 16-32.

The real basis for the differences in the two classes of evidence is, that a party testifying to a negative may have forgotten a thing that did happen, or may have been paying no attention at the time the thing happened; but it cannot in reason be said that a thing is remembered that never existed.

But in order to hold that alleged negative testimony is entitled to no weight at all, it is necessary to attribute the negative testimony to inattention, defective memory, or insufficient means of knowledge, or some like cause.

Moreover, it is to be remembered that evidence may be negative in form, though not in fact, in the sense of the rule. This is illustrated by the case of *Coughlin v. People*, 68 Am. Dec., 541. In that case several witnesses swore that the defendant struck the assaulted party.

Other witnesses swore that he did not, and the Court held that the latter was not negative testimony. The same principle is announced in *Delk v. State*, 3 Head, 79, and

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Williams v. Harriman, 3 Lea, 510. In the 3 Lea case just cited, the headnote, sustained by the body of the opinion, is, "If two persons, parties to a transaction, are called to testify and one swears positively that it did transpire, and the other as positive that it did not, the testimony of each is positive, and the question is then one of credit, and the rule of law as to positive and negative testimony does not apply."

In other words, it is error to assume that positive testimony can only be to the affirmative of a fact or occurrence.

Positive testimony may as well deny the existence of a fact or an occurrence, as to assert their existence. The question, in the aspect of the case under consideration, is, "Was the alarm whistle of the engine sounded as it approached Mrs. Abbott as she was walking on the end of the ties toward it before it hit her?"

As before shown, Mrs. Abbott, in answer to a question, swore that it (meaning the whistle on the engine) "Wasn't blown at all," that she did not hear it, "it never blown."

In answer to another question, she stated without any qualification or condition, that it was not blown and not sounded.

John Phelps, a young man standing on the side of the railroad on top of the cut some one hundred yards from the point of the collision of the engine with Mrs. Abbott, swore that the whistle did not blow, and that no whistles were blown or bells rung that he heard of.

Further, in his cross-examination, in answer to a direct question, he swore unqualifiedly that the whistle on this engine was not blown.

Young Phelps was in a position to see, and was paying attention to these trains as he expected to get on the south-bound train.

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We are not prepared to say, after a careful scrutiny and analysis of the testimony of Mrs. Abbott and young Phelps bearing on the question under review, that it is negative testimony in the sense of the rule, and, hence, entitled to no weight before the jury as against that of the engineer and fireman.

Its credit and weight were matters for the jury to determine in the light of all the evidence before them. And, assuredly, it was not within the province of the trial Judge, in effect, to withdraw it from the jury by telling them that it was entitled to no weight as against the positive testimony of the engineer and fireman.

The learned trial Judge submitted to the jury, in plain and unmistakable language, this question; in fact, he fully explained the law to the jury applicable to the facts, or which any evidence tended to establish.

There is no complaint of his general charge to the jury. The only complaint is as to his response to a request presented by appellant, which is copied in a previous part of this opinion. In this response he told the jury, as requested, that the statute in terms did not require the railroad company to ring the bell on its engine when an obstruction appeared on the track, but that a case might arise where the ringing of the bell might be a means under the general terms of the statute to avoid an accident.

We think no reversible error was committed by His Honor, the trial Judge, in making this response to the request. It is rather difficult to conclude that the learned counsel of the company is entirely serious in his seventh assignment of error, raising the question that the verdict of the jury is so excessive as to indicate passion, prejudice, and caprice on their part. There was contributory negligence on the part of Mrs. Abbott, which the trial Judge told the jury, practically in so many words, she was guilty

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of, and that they must lessen the damages allowed in view of it. The amount of the verdict is wholly inadequate as compensation for the permanent injuries received by her, and her life-long suffering entailed thereby in the absence of contributory negligence on her part.

The learned trial Judge heard the evidence, saw the witnesses who were orally examined before him, and heard her injuries described, and he discovered no sign or evidence of passion, prejudice or caprice in the action of the jury in the amount of their verdict, and neither do we, assuming her version of the collision to be true as the jury obviously did. We apprehend that the complaint of learned counsel is not so much at the amount of the verdict as to the fact that any verdict at all was rendered against his company.

From the latest utterance of the Supreme Court on the subject, it pays great respect to the action of the trial Judges who hear and see the witnesses and the injuries described in personal injury cases. In requiring remittiturs of verdicts, and, by parity of reasoning, his action in refusing to require a remittitur is entitled to consideration.

Grant et ux. v. L. & N. R. R. Co., decided at Nashville, April 20, 1914, and found in Volume 165, No. 4, May 20, 1914, p. 963 of S. W. R.

This assignment is disallowed, as well as the first and fourth, to the effect that there is no evidence to support the verdict of the jury, and that verdict should have been directed in favor of the company.

The remaining question is that a new trial should have been granted appellant because of newly discovered evidence as disclosed by the affidavit of its counsel, Mr. Carr, filed in support of its motion therefor. It is questionable if the assignment, in its terms, is sufficient to invoke favorable action by this Court upon it. It does not state that

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this newly discovered evidence, believed by counsel to exist, would have changed the result of the trial. All it says is that, in the opinion of counsel, it "will have a material effect and bearing on the result of the case."

But assuming it is sufficient, as based upon the affidavit of Mr. Carr, it does not warrant us in overruling the action of the trial Judge in refusing the motion.

The newly discovered evidence, suggested as obtainable in the affidavit, is cumulative to that introduced on the trial.

In addition to this, the affidavit of the parties, it is said counsel is informed will give this new evidence, are not presented.

A very able Judge of our Supreme Court, in an opinion approved by the whole Court, laid down the rule, that the affidavit alone of the unsuccessful party to a suit is insufficient to sustain a motion for a new trial, so far as it rested upon the opinion of others, or on the allegation that the opposite party had sworn falsely in a particular matter, and, therefore, he was taken by surprise, where the information and the matter deposed to relate to the very point in issue between the parties. Cooper, J., *Malone v. Searight*, 8 Lea, 91-95.

The learned Judge, in support of the rule above stated, referred to *Scott v. Wilson*, Cooke, 315; *Price v. Jones*, 3 Head, 85, and *Iser v. Cohen*, 1 Baxter, 421.

The rule above announced, in the 8th Lea case, *supra*, absolutely, in our opinion, supports the action of the trial Judge in refusing the motion for a new trial, based upon the affidavit of counsel of appellant.

The affidavit of Mr. Carr is to the effect that the witness, John Phelps, was not near the scene of the collision when it occurred, and did not see and hear what he testified he saw and heard; that he was not at Melt Strunk's, or board-

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ing there at the time, and did not commence to board there until the day after the collision, and that he never came to the house of Melt Strunk until two or three o'clock in the afternoon of the day of the collision, and the substance of the affidavit is, that affiant is informed that he can prove these facts by the wife and members of the family of Melt Strunk.

As before stated, the affidavit of the wife of Melt Strunk, nor that of any member of the family, is presented.

Melt Strunk was examined by the company in the trial. He was brought there by the company after the case was taken up for trial. He testified that he did not see Phelps at his house until in the afternoon of the day of the collision, or that he did not remember of seeing him there.

There is no averment in the affidavit of counsel that he was not informed of what he could prove by Mrs. Melt Strunk in regard to Phelps being at her house, and when he commenced to board there, before the case went to the jury.

Giving his affidavit its most enlarged import, it only states that affiant discovered this evidence "too late to get it before the jury." This did not meet the requirement of the law applicable to motions for new trials for newly-discovered evidence.

Railroad v. Jones (16 Pick.), 100 Tenn., 512-522. In that case there was a motion for a new trial for newly-discovered evidence based upon the testimony of one Watson, a colored man. The affidavit of Watson, and, also, those of counsel in the case were submitted.

Said Judge Beard, speaking for the Court: "It is unnecessary to state the substance of Watson's affidavit, for, conceding that what he states in it was important, and might have affected the jury in consideration of the case (though we are satisfied that his testimony, as set out in

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this record, would have been of no value), yet we agree with the trial Judge, that the application came too late. The affidavit of one of these counsel shows that at least during the argument of the case, and before it had gone to the jury, he ascertained what Watson would testify to, yet he did not call the attention of the Court to his discovery of this new testimony and ask leave to submit it.

"This he might have done, for it is in the sound discretion of the trial Judge to permit the case to be re-opened and evidence to be introduced after argument has begun." Citing, 2 Elliott, Gen. Pr., Sec. 578; *Couvie v. Bank*, 100 Ind., 247; *State v. Rash*, 12 Ire. Law, 382.

Now we are almost prepared to say with a good deal of confidence after a careful examination of the entire evidence in the record, that supposed or believed, by counsel, newly-discovered evidence, as stated in his affidavit, would have been but of little if any value.

Wiseman and Beeler, respectively conductor and brakeman on the south bound train, testified for the company.

Phelps testified for Mrs. Abbott. He testified that one of these men, or a member of the crew on that train in its caboose, told him that a person had been struck, and on this information he went where Mrs. Abbott was hit and found her at Melt Strunk's. Wiseman and Beeler were put on the stand and testified after Phelps testified. Neither disputed telling Phelps what he said they told him.

We have given the case the most careful examination, and find no reversible error in the record.

The judgment of the trial Court is affirmed with cost.

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FRED C. BROENS v. DISCOUNT BANK & TRUST COMPANY.

1. **BILLS AND NOTES.** *Maturity. Calendar months.*

A note dated April 28, 1913, and due two months after date is held to mature on the 28th of June following, although more than sixty days elapsed in the meantime. Notes maturing thirty or sixty days from date are held to become due at the corresponding month date of the month of maturity.

2. **SAME.** *Presentment for payment. Note maturing day before a holiday.*

A note maturing on the day preceding a holiday may be presented within banking hours on the next succeeding business day.

FROM SHELBY COUNTY.

Appeal in error from the Fourth Division of the Shelby Court. H. W. LAUGHLIN, Judge.

EDGINGTON & EDGINGTON for Plaintiff in Error.

RAMSEY & McCORMICK for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS suit was commenced December 1, 1913, by defendant in error before a justice of the peace against Robert K. Berry, W. B. McGee and Fred F. Broens to recover on a note for \$175.00 executed April 28, 1913, and due two months after date, with reasonable attorney's fees and a protest fee.

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The justice of the peace, December 8, 1913, rendered a judgment against Robert Berry and Fred Broens for \$177.50 and costs of suit, and there was a nonsuit as to W. B. McGee, it appearing that summons had not been served upon him, he being out of the county.

Broens appealed to the Circuit Court. Berry did not appeal.

The case was tried in the Circuit Court April 4, 1914, before the Judge without a jury, it being a non-jury case. The learned Judge found for the plaintiff in the sum of \$175.00, with interest from June 30, 1913.

So finding, he rendered a judgment against Fred F. Broens and E. B. Douglas, as surety on his appeal bond, for the principle of the note, to wit, \$175.00, and \$7.95 interest from June 30, 1913, making his total judgment \$182.95.

He also taxed appellant with the costs.

Defendant Broens moved for a new trial, which was overruled.

The record shows that Broens excepted to the action of the Court overruling his motion for a new trial.

The record shows that he tendered his bill of exceptions to the action of the Court overruling his motion for a new trial and prayed an appeal to this Court, which was granted upon his entering into bond in the sum of \$375.00 conditioned as required by law.

This appeal bond was executed.

He assigns the following errors:

1. The date of the note sued on is April 28, 1913, and it was due two months from date, and this would make it fall due Friday, the 27th, or Saturday, June 28, 1913. Under this assignment it is claimed that this particular Saturday was not otherwise by statute a legal holiday,

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but the latter half of said Saturday was a holiday. As a part of this assignment, it is stated that Broens testified that he knew nothing about the dishonor or non-payment of the note until the 28th of September, 1913; that he received no notice from any one that it had not been paid; and, in short, that the first he knew about it was on the 28th or 29th of September, 1913.

In connection with this assignment, it is stated that the notary public testified that June 30, 1913, as a notary public, he put in the mail at Memphis a notice of protest of the note addressed to Broens, and that he did this personally.

The contention of appellant Broens, under this assignment, is that a notice mailed on June 30, 1913, was mailed too late, but that notice should have been mailed or given to appellant, as required by Section 103 of the Negotiable Instrument Law, which is Acts of 1899, Chapter 94.

The second assignment of error, in substance, is that if the Court holds that a presentment of the note for payment was necessary in order to bind the endorser, then, the contention is that no presentment was made in this case.

The fundamental contention of appellant and his learned counsel is that the notice of the non-payment of this note was mailed too late. In other words, the insistence is that it should have been mailed on Saturday, to 28th, instead of on Monday, the 30th of the month.

This note, in our opinion, fell due on June 28, 1913, which was on Saturday. It was presented for payment on Monday, June 30, and protested for non-payment on that date and notice sent to the endorsers.

If correct in this view, the demand for payment and the protest were seasonably made.

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The Negotiable Instrument Law, Section 85, is as follows: "Every negotiable instrument is payable at time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may at the option of the holder be presented for payment before 12 o'clock noon on Saturday, when that entire day is not a holiday."

In addition the Negotiable Instrument Act under the Section quoted provides that every negotiable instrument falling due on Saturday are to be presented for payment on the next succeeding business day, which would be Monday following. But where Saturday, under the law of the jurisdiction, is only a half holiday, the paper may be presented for payment at the option of the holder before 12 o'clock, noon, on Saturday.

The argument of learned counsel of appellant seems to proceed upon the idea that this note fell due on or not later than June 27, 1913, and he reaches this conclusion by counting thirty days as a month. But even on this assumption, excluding the day the note was executed, it would not fall due until the 27th, and Saturday, under the Negotiable Instrument Act being a holiday, its presentation and protest on the Monday following would comply with the law.

There is no error in the judgment of the Court below, and it will be affirmed with cost.

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DIXIE PORTLAND CEMENT COMPANY V. RUSSELL CASE, BY
NEXT FRIEND.

Writ of certiorari denied by the Supreme Court at
Nashville, 1914.

1. MASTER AND SERVANT. *Proof as to duration of defect.*

The burden is on an injured servant suing his master for using defective instrumentalities to show that the defect which caused the injury had existed for such length of time as to justify the inference that the master either knew of it or would have known of it had he been exercising reasonable care.

2. SAME. *Misuse of instrumentality.*

A servant who uses an instrumentality for a purpose other than that for which it is designed cannot recover for injuries received while so doing.

FROM MARION COUNTY.

Appeal in error from the Circuit Court of Marion
County. NATHAN BACHMAN, Judge,

CHAS. C. MOORE for Plaintiff.

TATUM & THATCH for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of
the Court.

THIS is a suit by defendant in error against the Dixie Portland Cement Company to recover damages for personal injuries received while in its service. The original

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writ in the case issued April 8, 1913, laid the damages at \$20,000.00.

The original declaration filed claimed \$10,000.00 damages. It alleges, in substance, that said Cement Company is a corporation with its main place of business at Richard City, Marion County, Tenn., and March 5, 1913, it was engaged in the manufacture of cement, and operated a shale quarry in the manufacture of its product, the quarry being near its plant.

It alleges that the shale from the quarry was hauled in cars over a narrow gauge track to its manufacturing plant, these cars being two or three feet high, three or four feet wide, and six or eight feet long, and were pulled from the shale pit to the top of the hill, and there the cars went by their own momentum to the foot of the incline where other employees of the company took charge of them.

It alleges that the Cement Company had in its employ many servants, agents, etc., in carrying on its business, and on the date aforesaid, Russell Case was in its service, being employed as a mule driver driving one of the mules hauling cars loaded with shale from said quarry to the top of the hill, and in doing so it was necessary, and his duty, to ride the car and drive the mule until the car reached near the top of the hill, when he had to get off the car while it was in motion, unhitch the mule from it, and allow it to roll to the foot of the incline; and at the place where he got off the car a metal hook or step was fastened to its side about four or six inches from its end, and which hook or step was used in getting off and on the car, and it was the duty of the company to use ordinary care to keep said cars in a reasonably safe condition so that defendant in error could ride it, get on and off of it while the same was moving as he was required to do by the company in doing his work.

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It is alleged that the company neglected its duty in this respect in allowing the hook or step on the car on which plaintiff below was riding to be broken or worn off, so that instead of there being three and one-half or four inches of it extending out for him to step on, as it previously existed, and which was usual and customary, and which was reasonably safe, only about one-half inch of the hook extended out, thus not leaving room for his foot to rest upon it when he attempted to dismount from the car, and making it dangerous, and defective, and unsafe, and he did not know, and by the exercise of ordinary care could not have known, of said condition, and the company did know, or by the exercise of ordinary care could have known of its said condition.

It is alleged that while in the line of his duty, and while riding the car having the said hook attached to it, plaintiff below, March 5, 1913, about 7:30 P.M., after dark, attempted to dismount from the car, and when he placed his foot on said hook, it being in the condition stated, and too short, he was thereby caused to fall and be thrown to the ground, and his right foot and leg were thrown on the track, in front of the wheels of the car, which ran over them, cutting and lacerating his entire leg, injuring his knee, and knee joint, and injuring and dislocating his hip, causing him to suffer great mental and physical pain and anguish, to lose much time from his work, and to pay out large sums for doctor's bills, medicine, and nurse hire.

It is alleged that at the time he was injured, it was very dark, and that no lights, or insufficient lights, were furnished by the company, and, hence, he was unable, by the exercise of ordinary care, to see and know of the defective condition of said hook.

It is also alleged that the negligence aforesaid was the proximate cause of the injury.

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The company, August 9, 1913, presented a petition averring that it was a corporation under the laws of West Virginia, and asked that the case be removed to the Federal Court at Chattanooga, Tenn., the amount sued for, exclusive of cost, being over \$3,000.00, on the ground of the diverse state citizenship of the parties.

Upon the presentation of this petition, and the motion for the removal of the case to the Federal Court, plaintiff below moved to amend the writ and declaration so as to sue for \$3,000.00, and thereupon the Court dismissed the petition for the removal of the case. The company excepted to this action of the Court.

At the December term of the Court below plaintiff in error, upon motion, was allowed to amend his declaration, so as to allege that the cars mentioned in the declaration were from four to five feet high; that he is a minor; that both of his parents were dead, and died before his injuries, and that neither at the time of his injuries nor since has he had a regular guardian, and that he is entitled to recover, on account of medical and hospital bills incurred, \$50.00.

While we find no plea of the company in the record, it appears that the case was heard before the Court and jury upon the assumption that it had pleaded the general issue.

The jury returned a verdict against the company for \$1,500.00, upon which judgment was entered.

Its motion for a new trial was overruled, and it appealed in error to this Court.

It assigns the following errors, in brief:

1. The Court erred in overruling its motion for instructions to the jury to return a verdict in its favor made at the conclusion of all the evidence.
2. The undisputed evidence shows that plaintiff below violated the established rule of the work requiring him to

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report to his foreman such defects in the cars needing repairs as the breaking off of a hook. This was a patent and obvious defect, which plaintiff either knew, or by the exercise of ordinary care for his own safety, would have known, and his failure to discover and report this condition was the proximate cause of the injury complained of.

3. There is no evidence to show that the hook complained of had been broken off previous to the accident, and no facts are disclosed from which the jury could infer that such condition had existed for a sufficient length of time previous to the accident for the defendant to have discovered and repaired the defect.

4. There is no evidence to support the verdict of the jury.

5. The Court erred in permitting witness, Ed Hughes, and other witnesses of the defendant in error to testify, that on one or more previous occasions the hook on one or more of the cars similar to the one complained of in this case remained broken off and out of condition for several days.

6. The Court erred in charging the jury that plaintiff in error would be liable if the hook in question had been used as a step, both copied in the statement of the case above.

We feel constrained, after a careful and painstaking examination of the evidence in this case, to hold, as a matter of law, under our decisions, and the weight of decisions in other jurisdictions, that the motion of the plaintiff in error for an instructed verdict in its favor at the conclusion of all the evidence should have been sustained. The plaintiff in error had a cement plant. It owned a shale quarry some hundred or more yards from where its plant for the manufacture of cement was located. It had a tram railway running from its shale quarry to its manu-

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facturing plant. This shale was hauled from the shale quarry in small cars, some three or four feet high, and four or five feet wide, and six or eight feet long. These cars, when loaded with shale, were pulled up to a certain point to the top of an incline, and there the mule was unhitched from the car, and it was allowed to roll down of its own momentum to the plant of the company, where it was taken charge of by other employees there.

Defendant in error, a boy of seventeen or eighteen years of age at the time of his injury, was employed as a driver of one of the mules hauling one of the cars loaded with shale to the top of the incline where the mule was detached from the car, and the car allowed to roll down to the plant.

It appears that these cars had what is called hooks on each side near each end of these cars. These hooks were put there for the purpose of hitching the gear of the mule to them for the purpose of pulling the cars loaded with shale to the proper point where the mule was detached and the car allowed to roll down to the plant.

It appears that the mule hitched to the cars walked beside the tram railway. The proof tends to show that sometimes the drivers of the mules, instead of hitching the mules to these hooks, hitched them to the top of the cars. The drivers were expected to walk beside the car, and not ride the cars when loaded with shale. The proof, however, shows that they very often rode the cars, and did so with the knowledge of the officers in charge of the company's business at the shale quarry. In other words, they rode the cars quite often with the knowledge of their foremen.

As before stated, these hooks attached to the cars were not put there for the purpose of enabling the drivers of the cars to get on or off the cars. The proof, however, shows that they frequently did use these hooks for the purpose of getting on or off the cars. The proof, also, shows

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that it was the duty of the drivers of cars, on discovering any defect about the cars, to report it to the foreman, and the company had a man to repair defects. This boy, at the time of his injury, was driving one of the cars. His car had been loaded with shale, and the mule was pulling the loaded care to the place where the mule was to be detached. The defendant in error was alighting from the car. Just before the car reached the place where the mule was to be detached, he started to descend from the car to prod or whip his mule and make him go faster. He started to descend from the car, and, for that purpose, expected to put his foot on one of these hooks that extended from the side of the car some two and one-half or three inches. It appears that all of this hook had been broken off except about one inch. When his foot reached this hook, and he placed his body to stand upon it, his foot slipped from it because it was not broad enough to hold it, and he fell, and, in his fall one of his feet and legs got under the car and was seriously injured.

Now, there is no proof as to when this hook on this car became defective. The boy was using the car, and it is contended, and so it appears reasonable, that he would have been the first to discover its condition. However, he did not, but just when the hook was broken does not appear, whether it was on that trip, whether it had been broken long enough for the company to discover it, or to be affected with notice of its defective condition, is not shown.

Now, it does appear, as before stated, that the drivers of these cars were frequently seen by their superiors in ascending and descending from these cars by means of these steps. There is no evidence that there was any affirmative permission by the company for them to do so, and if there was nothing else in the case, with this proof in the record, we would be disposed to hold the company liable on the

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doctrine, that it was the duty of the employer to furnish his employes a reasonably safe place in which, and safe appliances with which, to do the work assigned them. But here is a simple appliance attached to the side of a car near its end. It was put there for a definite purpose, and not for the drivers of the cars to ascend and descend from the car by using it. Surely, in order to hold the company liable under the facts stated, it ought to be made to appear that this car was in this defective condition for such a length of time, that a reasonable inference could be made that it was aware of it.

As stated, there is no evidence to show that the hook complained of in this case was broken off previous to the accident, and there are no facts in the evidence from which a jury could infer; that its defective condition had existed for a length of time previous to charge the company with notice of its defects.

If correct in these views, it follows that the Court should have sustained the motion to direct a verdict in favor of the company, and, if this be so, it is wholly unnecessary for us to discuss the other assignments.

We may observe, however, that the Court charged the jury, in substance, that the company would be liable if the hook in question had been used as a step by the drivers in getting upon and getting off the cars, and it was defective.

This is not in exact accord with the law. If the step had been used by the drivers, as stated, with the knowledge of their superiors, the rule would be true, provided the step had been broken a sufficient length of time to affect the company with knowledge of its defective condition.

The judgment of the Court below will be reversed and the cause dismissed.

Plaintiff below will pay the costs.

PITTSBURG PLATE GLASS COMPANY v. HENRY CANNON.

Affirmed substantially by Supreme Court at Jackson, 1915.

1. MASTER AND SERVANT. *Negligent order of foremen. Question for jury.*

Whether the foreman of a gang engaged in moving heavily crated glass was negligent in his method of placing his men at work, and whether he was negligent in calling any one of the employes from one point and directing him to another, were questions for the jury.

2. SAME. *Negligent order or negligence in failing to give an order. Proximate cause.*

There can be no recovery by a servant for injuries sustained because of the alleged negligence of his superior in giving or refraining from giving proper orders unless this negligence of the foreman was the proximate cause of injury.

3. PEREMPTORY INSTRUCTIONS. *Practice with respect to presence or retirement of jury during arguments.*

It is the duty of the Circuit Judge to send the jury from the court room during the argument of a motion for a directed verdict, if so requested.

4. PRACTICE INSTRUCTIONS TO JURIES. *Stating theories and issues.*

It is the duty of the trial Judge to state the issues of fact which a jury is called upon to determine; and in stating the theories of the respective parties the Court should be reasonably full, and should be accurate.

5. SAME. *Leaving to jury. Determination upon theories.*

It is error for the Court to state to the jury that it is their province to examine all the theories presented by various

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counsel and adopt that one they think supported by the evidence. This would leave the jury free to adopt a non-recoverable theory.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Department No. 3, A. B. PITTMAN, Judge.

CARUTHERS EWING and EARL KING for Plaintiff in Error.

L. H. GRAVES and L. L. PEARSON for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS is an appeal by the Plate Glass Company from a judgment rendered against it for \$1,250.00 in favor of the plaintiff for personal injuries alleged to have been inflicted upon him by the negligence of the defendant company. The first error assigned is, that the trial Judge should have sustained defendant's motion for a directed verdict at the close of plaintiff's proof, and repeated at the conclusion of all of the proof. We do not intend to go into detail as to the facts of this case, for the reason that it must be reversed and again tried by a jury of Shelby County.

The declaration avers that Cannon was working for the company on the 2nd of October, 1913, and that acting under the orders and directions of his foreman, he was helping to unload a crate of plate glass from a car into a wagon; that he, with four other laborers, was pushing the crate, which weighed over 2,500 pounds, on a pipe that was used as a roller, in order to get the crate off the car

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onto the wagon; that while he and the other four men were pushing it, he, being behind the crate, was ordered by one of two white foremen, who were overseeing the job, to go to the left side of the crate for the purpose of balancing it; that he did as he was ordered, and that the crate was so heavy that when it tipped, or became unbalanced, it was impossible for him to balance it; and that it then fell on his shoulders and pushed him down on the edge of the car, crushing him and doing him the injury set out in the declaration. It then averred that he was unable to balance the crate and keep it from falling on him, and that the task assigned him by the company was impossible in the very nature of things, on account of the weight and size of the crate of glass. It is next averred that the act of the defendant company's foreman in ordering him to do that which was impossible constituted the proximate cause of his injury.

This is the substance of the averments in his declaration, except, in a paragraph immediately following, it is said his injury was the proximate result of the gross negligence of the defendant, and that this reckless, wanton negligence was the sole and only cause of his injury. What this declaration means, or what a fair interpretation shows it to mean, seems to have been a much debated question in the lower Court, and has been lengthily discussed in the brief of learned counsel. We think a fair interpretation of this declaration is, that the work plaintiff was directed to do was impossible for him to perform without more help was furnished to assist him. In other words, while the declaration does aver that the work was impossible of performance, we think it means that plaintiff was unable to do the work alone and unaided, and that the defendant's negligence consisted in not furnishing sufficient help to assist plaintiff in this particular job. Any evidence that tended

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to show that additional help was needed to perform this work, or which tended to show that plaintiff could not do it alone, on account of the size and weight of the crate of plate glass, was competent to go to the jury on the trial of this cause. We do not think evidence tending to prove that the plaintiff was not instructed as to how to do the work, or warned of the danger there was in doing it, was competent, for the reason there is no averment in the declaration of a failure to warn or a failure to instruct him. The sole and only question, as we see it, in this declaration for the determination of the jury, was whether the defendant company assigned to this work a sufficient number of hands to do it so as not to result in an injury to plaintiff while performing this labor. Bearing in mind this construction of the declaration, we will briefly state the facts this record discloses.

Plaintiff is a negro carpenter, and not accustomed or experienced in unloading crates of late glass, which the proof shows are very heavy. He had been engaged in this work something like an hour before receiving the injury. The first work done by him was knocking the crate of glass loose from its fastening to the car. After doing this, he and seven other men attempted to move it to the end of the car where it was to be loaded on a wagon. The crate was ten or twelve feet long, eight or ten feet high, and six or eight inches in thickness, and in order to move it, steel pipes, three inches in thickness, were placed under the front end and middle of the crate while it was standing in an upright position. One man was at the front pulling the crate, one in the rear, and three were placed on each side of it to balance it so as to keep it from falling. It had been moved some distance, when the roller in the middle had reached the rear of the crate, and the one placed in front had reached the middle of it. The man in front called to

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Matt Harris, who was on the same side plaintiff was, close to the north end of it, to bring him the iron roller to be placed under the front end of the crate. Harris carried the roller to the front end, where some evidence indicates he was trying to place it under the crate. When he left the side on which plaintiff was at work, he being at the front end and another colored man between him and Harris, it is insisted by plaintiff that that left only two men on his side of the crate to help him hold it steady, and keep it from toppling over, which were insufficient for that work, and that as soon as Harris left, or very shortly thereafter, the crate toppled over on him and did the injury for which this suit is brought. Some of plaintiff's proof tends to show that the foreman, Mr. Burkhardt, was at the far end of the car at work, but defendant's proof tends to show that Burkhardt was at the rear end of the crate aiding in pushing it towards the front of the car. Just what caused the crate to topple over is not clearly shown by the proof of either plaintiff or defendant. The theory of plaintiff is, that when Harris left his side of the crate, that left only himself and another man to balance it on that side, while it required the strength of three men to keep it from toppling over, and that this was the cause of it falling on him. It is insisted that if the company had kept three men on each side of the crate, and not allowed one to leave even for a brief time, the crate would have been kept steady, and would not have fallen. It is not certain from the testimony just how long after Harris quit his work of helping to balance the crate, it was till the crate fell on plaintiff. There is some evidence that tends to show it fell right away, while there is other proof that indicates it did not fall until Harris reached the front end with the roller, and that it fell while he was trying to place it under the crate. There is likewise some testimony that tends to show that

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when Harris quit balancing the crate and started to the front end with the roller, the foreman, Mr. Burkhardt, ordered the man who was pushing from the rear to take Harris's place and help to balance the crate. While there is other proof that tends to show that Mr. Burkhardt was some distance north of the crate doing work on another part of the car, yet, the evidence of the defendant, and the testimony of Harris himself, indicates to the contrary, and tends to show that he was pushing the crate from the rear end of it, and that it had stopped still, and was not wobbling when Harris quit to carry the roller to the front, and that the foreman then directed the colored man pushing from the rear to take Harris's place and help to balance the crate, and that he promptly did as before it began to topple or lean towards the plaintiff. The testimony of Burkhardt and defendant's witnesses tends to show that he knew that Harris had been requested to bring the roller to the front, and it is insisted by plaintiff's learned counsel that it was his duty to prevent Harris leaving his position, and to keep him in his place to assist in balancing the crate, or that if he permitted him to leave his place of work, it was then his duty to order another man to take Harris's place at once, so as to have three men on each side of the crate to keep it from falling. It is then insisted that the failure of the foreman to keep Harris in his place of work, or to supply another man in his place, was an act of negligence which was the proximate cause of the injury plaintiff sustained.

While we think this a very close case, and that it is a matter of some doubt whether the defendant company is legally liable for this injury or not, yet, we feel constrained to overrule the assignment of error going to the action of the Court in refusing to direct a verdict, and to submit the

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question again to a jury upon a proper charge under the construction of the declaration which we have given herein.

Under the second assignment it is insisted the Court was in error in requiring defendant's learned counsel to argue the motion for a directed verdict in the presence of the jury. We think this is clearly manifest error. This record shows that, when the plaintiff closed his testimony, defendant's learned counsel thereupon moved for a directed verdict. He asked to be allowed to make this motion out of the presence of the jury, but the Court replied, "I never exclude the jury on a motion for a P. I. . . . Just state the motion Mr. King, I don't know that I will want to hear argument on it." Thereupon, counsel for defendant stated in the presence of the jury his grounds for the motion, when it was overruled by the Court with the statement, "You may renew the motion at the conclusion of all the testimony, when I will hear argument." To this action of the trial Judge the defendant excepted. At the conclusion of all the testimony, defendant's learned counsel stated to the Court, "I want to renew my motion for peremptory instructions on the same grounds as stated at the close of the plaintiff's proof. I want to argue it and be permitted to argue it out of the presence of the jury." To this the Court replied, "I am going to allow you to argue it in the presence of the jury, and as a part of the argument of the whole case." Defendant's counsel then excepted to the action of the Court in requiring him to argue his motion in the presence of the jury, and to this exception the Court stated, "I do not require you to argue it at all." Thereupon plaintiff's learned counsel proceeded to argue all the facts of the case, and how much time he consumed in doing so the record fails to disclose. The record does show, however, that in his argument to the Court in the presence of the jury, on the motion for peremptory in-

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structions, he insisted that the defendant was liable, first, because of insufficient help; second, the ignorance of the plaintiff as to the weight of the glass; third, that the presence of the foreman during the moving of the glass was in legal contemplation his actual supervision of the work, and whether or not his back was turned when the glass fell matters not, as it was his duty to see that it did not fall; fourth, that the plate glass fell at once upon Harris leaving his place; that three men on one side and two on the other changed the balance, causing immediate falling upon Harris leaving; fifth, that the presence of Burkhardt on the car when the change took place amounts to a ratification of the change and amounted in legal contemplation to an order from said foreman to Harris to leave his place; sixth, that defendant ordered Cannon into a dangerous place to work; seventh, the dimension and size of the crate, stating the length and width and suggesting same as a matter for judicial notice.

These seven theories, or propositions of fact, or of negligence, it seems were argued before the jury as grounds of liability of the defendant. After plaintiff's learned counsel concluded his argument to the jury, defendant's attorney then proceeded to argue at length in the presence of the jury these various propositions, or theories, or acts of negligence, to the Court. This record shows that twenty-six pages are covered by the argument of defendant's counsel and his replies to the argument or statements of the learned trial Judge as they bore upon some, if not all, of the theories of learned counsel for plaintiff. Some of the testimony of a portion of the witnesses was argued both by the trial Judge and learned counsel for defendant. In the latter's argument to the Court, he urgently and persistently insists that there was no evidence of negligence shown by plaintiff's proof, and while doing so the trial

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Judge would indicate the evidence of negligence insisted upon by plaintiff's counsel, and in some instances called on defendant's counsel for a reply to the argument. It is not necessary that we undertake to set out all that was said both by the trial Judge and learned counsel for defendant during this protracted discussion on the motion for a directed verdict in the presence of the jury. It is clear to our minds that the jury could reach no other conclusion than that the Court was turning down every proposition urged by defendant's learned counsel, except one, and that was that the servant who called to Harris to bring him the iron pipe was not a vice principal, and had no authority to order or direct any of the hands there at work. After this discussion by the trial Judge and learned counsel was concluded, counsel then attempted to address the jury on the facts of the case, and we quite agree with him when he says his argument was practically an idle ceremony. The jury's mind had, no doubt, become fixed against his client by hearing what the trial Judge said during his argument for a directed verdict. That the jury returned a verdict against defendant is not to be wondered at under these circumstances, and, in fact, it would have been remarkable if they had taken the bit in their own mouths and overriden what they could well and easily see was the opinion of the learned trial Judge concerning the facts of this case and the liability of the defendant. Without further comment on this, to our minds remarkable proceeding, we will simply content ourselves with saying that it was manifest error and would entitle defendant to a reversal of this case if nothing else appeared in the record.

We think it was error in the Court in admitting any evidence about the danger of the work plaintiff was doing, or the failure of defendant to instruct him or warn him of such danger, for the reason neither was made a ground of liability in the declaration.

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The fourth and fifth assignments are overruled for the reason that we think the law as stated therein is substantially correct.

Under the sixth assignment it is insisted the Court was in error in that part of his charge to the jury which is as follows:

“The theory of the plaintiff is, that he was employed by the defendant to do an impossible thing, to sustain an impossible weight, and that he didn’t know that at the time but that the defendant did know it, and that he therefore, not knowing it, was not guilty of contributory negligence in undertaking the job because at the time he did not know that it was an impossible job he had assumed to do, but that the defendant did, or ought by the exercise of ordinary care, to have known it. That is the plaintiff’s theory.”

If that was the plaintiff’s theory on the trial of this cause in the lower Court, it was to some extent at variance with the averments of his declaration, for there is nothing therein charging that he did not know that he was employed to do an impossible thing when he began his work. In fact, there is no averment in the declaration about his want of knowledge of the character of work he was employed to do, or the knowledge of the defendant as to such work. His testimony shows that he is a man of about sixty years old, and has been doing carpenter work for a long time, and knew about the weight of this crate of glass. He knew its size, and certainly must have known something about whether it could be easily managed or not. There is no averment in the declaration of a want of such knowledge on his part, or a superior knowledge on the part of the defendant. He simply averred that he was employed, with four others, to push a crate of glass, and he alone was directed to go to one side of it and keep it from falling,

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which, as he says, it was impossible for him to do. There was no averment that he did not know it was impossible for him to keep it balanced, or that the defendant knew he could not do so. In this portion of the Court's charge we think he failed to clearly state the issues to the jury as they are shown by the pleadings, and this was prejudicial in the Court. 2 Higgins, 520; 112 Tenn., 207; 90 Tenn., 711.

We will not undertake to set out that portion of the charge found under the seventh assignment of error, but think it liable to the same objections as apply to the sixth assignment. The Court did not clearly state the issues raised by the pleadings, and charged that plaintiff's theory was that he did not know of the impossibility of his doing this work, and that the defendant did know it. No such issue was raised by the pleadings in this case. The only issue made was whether the defendant had a sufficient number of men present at the time to help plaintiff balance the crate of glass and keep it from falling as it did. The instructions to the jury should have been confined to this issue.

It is next insisted that the trial Judge was in error in giving to the jury as a part of his charge, the following instructions:

"Gentlemen, I will charge you on one other phase of this case. I have not undertaken in the charge to discuss in detail the various theories of the parties to the lawsuit, but have confined the charge to a discussion in its general application. Now the jury having heard the evidence and listened to the lawyers discussing their various theories as to how it happened, will apply the principles of law that I have announced in the charge to whatever theories you find sustained by the evidence, I will refer to one theory that argument has been directed to by both sides and make this statement as applicable to that theory."

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We think this instruction was clearly erroneous. Instead of directing the jury to apply the principles of law that he had announced in his charge to whatever theory they found sustained by the evidence, the Court should have confined his instructions to the issues raised by the pleadings. As it appears, *supra*, the learned counsel for plaintiff had advanced seven theories, upon either one of which he insists the defendant was liable. By an examination of the declaration it appears that but one of his theories was in issue, and that was, the failure of the defendant to have a sufficient number of men present to assist in the work. Yet, under this instruction, the jury was warranted in returning a verdict for the plaintiff if they found either of the seven theories insisted upon by plaintiff's learned counsel, sustained by the evidence. This charge placed the burden upon the defendant to come prepared to deny and meet every theory advanced in argument to the jury by plaintiff's learned counsel. Some of these theories he may have never suspected would be insisted upon; yet, however far-fetched such theories might have been, the jury was instructed to find in favor of such theory if there was evidence to support it. We hardly think the learned trial Judge, who is usually very clear and correct in his charges to the jury, fully appreciated just what he was saying in this particular part of his charge. It is unnecessary that further comment be made on this instruction, as it was clearly error.

Several requests were offered by the defendant's learned counsel to the trial Judge which he sought to have incorporated as a part of his charge. The request found under the 12th assignment of error we think should have been given to the jury. It was not covered by any part of the general charge. It is in the following language:

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"Gentlemen of the jury, if you should find that the foreman, Mr. Burkhardt, was behind the case at the time Matt Harris was called to bring the roller to the front end, and that he saw Harris leave the rear and take said roller to the front of the case, and that he said nothing to Harris and gave no orders whatever, I charge you that his failure to order Harris back to his place will not render the defendant liable in damages to the plaintiff in this case, unless you further find that the failure of the said foreman in this regard was the proximate and direct cause of the injuries sustained by plaintiff, and that such order, if given, would have resulted in the plaintiff's safety from the injuries he suffered."

This was certainly a correct statement of the law of this case. If Burkhardt's failure to keep Harris in his place of work was not the proximate and direct cause of plaintiff's injury, then it seems to us that he would have no right to recover from this defendant, and, under this request, it would have been left to the jury, as it should have been, to say whether or not the failure of the foreman in the respect mentioned was the direct and proximate cause of plaintiff's injury. The whole argument of learned counsel for appellee in this Court, and we gather from the record that it was the burden of his contention in the lower Court, was that it was negligence in the foreman to permit Harris to leave his place of work, and in not ordering him back to his position. Granting that this was negligence in the foreman, that of itself would not make the defendant liable. Such negligence must have been the proximate cause of plaintiff's injury in order to entitle him to recover in this action. The entire case seems to turn upon that one question of fact. Plaintiff's counsel insists that three men should have been kept

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on each side of the crate in order to keep it balanced and prevent its falling.

It is insisted by learned counsel that defendant's negligence consisted in taking one of these men away from the side on which plaintiff was working, or to permit him to leave that side was an act of negligence for which the company was liable to plaintiff for his injury. If such act of negligence was not the proximate cause of his injury, then plaintiff could not recover on account of such negligence. For these reasons we think the trial Judge should have given this request as a part of his charge to the jury, and had he done so, the result might have been different.

It is stated by learned counsel for the company that there is no proof of negligence on its part, or on the part of its foreman, and that if there was any negligence whatever, it was the act of plaintiff's fellow servants, and the only act of negligence his learned counsel refers to and relies upon, as we gather it from his brief, is this particular act of Harris in leaving his place of work with the knowledge of the foreman, and the failure of the latter to promptly put someone else in Harris' place. It was at this particular time and in this way, plaintiff's learned counsel insists, that defendant failed to furnish a sufficient number of hands to do the work for which he was employed to assist in doing.

The other assignments, while some of them touch closely the border line of error, we hardly think we would be justified in sustaining. That this negro man was badly injured there is no doubt, and if the company is liable for his injury he should have a recovery in this suit; but we will not undertake to pass upon the facts of this case to determine whether he has made out his case of

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liability or not, for the reason that it must go back to be again tried before a jury, and for that reason it would be improper for us to express our opinion of this evidence.

It results that the judgment of the lower Court is reversed and the cause remanded for another trial in accordance with the principles announced in this opinion. The appellee will pay the cost of this appeal.

SOUTHERN RAILWAY COMPANY V. LEE J. SMITH.

Affirmed by Supreme Court at Knoxville, 1915.

CARRIER OF LIVE STOCK. *Notice of loss before removal. Compliance or waiver.*

A shipper of live stock under a bill of lading requiring notice of loss or injury to live stock to be given to the delivering agent before the animals are removed from the premises of the carrier complies therewith by calling the attention of the agent to the condition of the live stock before they are removed from the premises and having the agent carefully to examine them and to make note of the injuries upon the bill of lading.

FROM WASHINGTON COUNTY.

Appeal in error from Circuit Court of Washington County. DANA HARMON, Judge.

HARR & BURROW for Plaintiff in Error.

THAD. A. COX for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

Railway Co. v. Smith.

THIS suit was instituted by the defendant in error, Lee J. Smith, before a Justice of the Peace of Washington County against the plaintiff in error to recover damages for injuries to a shipment of live stock consisting of twelve mules, which were shipped from Concord, North Carolina, to Watauga, Tennessee, over plaintiff in error's line of railroad.

The case was finally carried to the law Court at Johnson City, where it was tried before the Court and a jury, and a verdict and judgment rendered against the railway company for \$200.00. From this judgment the railway company appealed to this Court, after its motion for a new trial had been overruled.

Evidence was offered by the defendant in error (plaintiff below) tending to show that the mules were delivered to the railway company at Concord, North Carolina, in good condition, and that when the shipment arrived at Watauga, Tennessee, one of the mules was dead in the car, and another had its hip crushed so that it afterwards had to be killed; another had its knee injured in such a way as to practically render it valueless, and others of the shipment sustained injuries of a less serious character.

The live stock contract, under which the mules were shipped, contained the following provision:

"That as a condition precedent to any right to recover any damage for loss or injury to said live stock, notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock."

No notice in writing of the claim for damages was given the railway company by the defendant in error prior to

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bringing the present suit; but the evidence shows, however, that the defendant in error called the railway company agent's attention at Watauga, Tennessee (the destination of the shipment), to the condition of the mules, and the agent examined them and noted on the freight bill their condition. In other words, the evidence tends to show that the railway company, through its agent at Watauga, inspected the shipment and familiarized itself with the nature and extent of the injuries which the mules received while being transported, and was in possession of all the information that notice in writing could have given it.

The first assignment of error is to the effect that the court erred in not holding that the defendant in error was bound to give the written notice of his claim for damages in accordance with the terms of the contract, and having failed to do so, he was not entitled to recover.

We are of the opinion that written notice was unnecessary, in view of the fact that the attention of the railway company's agent was called to the condition of the mules upon their arrival at Watauga (their destination), and the agent examined them and noted the injuries which they had sustained. This gave the railway company all the information concerning the injuries to said animals that a written notice could have given it. The purpose and object of requiring notice in writing before the stock is removed from the car or is intermingled with other live stock, is to give the agent of the railway company an opportunity to inspect the stock, ascertain the nature and extent of the injuries to them, and to prevent a fraud from being practiced upon the railway company.

We think this purpose was fully accomplished by the fact that the agent's attention was called to the stock by the shipper upon their arrival at Watauga, and he in-

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spected them and ascertained the nature and extent of their injuries before they were unloaded from the car, or before they were intermingled with other stock. In view of said inspection by the agent of the railway company at the point of destination, we are wholly unable to see the necessity for giving the written notice provided for in the contract.

By the second and last assignment of error it is insisted that the court erred in allowing the judgment for \$200 to be entered against the railway company, because the contract provided upon the question of damages the following:

"That should damage occur for which the railway company may be liable the value at the place and date of shipment shall govern the settlement, but in no event shall the amount claimed or recovered exceed: For horses and mules, each \$100.00."

The evidence shows that the mule found dead in the car was worth \$135.00, and evidence was offered tending to show that one bay mare mule, which had her hip crushed and had to be killed, was worth \$175.00, and also another eight-year-old mule worth \$150.00 had his leg hurt in such a way as to render it practically valueless, and still another black horse mule sustained damages to his feet and legs to the amount of \$40.00.

The verdict of the jury was for only \$200.00, which shows that the amount awarded the plaintiff by the jury was less than \$100.00 each for the two dead mules, and the mule that was practically rendered valueless by the injuries which it sustained, saying nothing of the black mule which was injured to the extent of \$40.00.

We are of the opinion that neither of said assignments of error can be sustained. The judgment is, therefore, affirmed with costs.

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NASHVILLE, CHATTANOOGA & ST. LOUIS R. R. v. ETHEL
S. JUSTICE AND HUSBAND.

Writ of certiorari denied by the Supreme Court at
Nashville, 1914.

MOTION FOR A DIRECTED VERDICT. *Credibility of testimony. Inherent improbability.*

When the testimony introduced by a plaintiff is shown by the physical facts and surroundings to be absolutely untrue, or when it is so inherently improbable as that no reasonable person can accept it as true or possible, the Circuit Judge should take the case from the jury, notwithstanding oral statements tending to show a right of action.

FROM DAVIDSON COUNTY.

Appeal in error from the Second Circuit Court of Davidson County. M. M. MEEKS, Judge.

CLAUDE WALLER AND FRANK SLEMONS for Plaintiff in Error.

J. B. DANIEL and LEVINE & LEVINE for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS was a suit by Mrs. Justice to recover of the railway company the value of a trunk and its contents which she claimed were damaged by the seeping in of molasses while the trunk was in the custody of the railway com-

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pany. She claimed that she sustained this loss while her trunk was in transit from Memphis to Nashville. The case was tried by the Court and a jury. Verdict and judgment for a substantial sum were in her favor. The company has appealed and assigned numerous errors.

After due consideration we feel constrained to the conclusion that the first assignment of error should have been sustained. This assignment is predicated upon the refusal of the Court to direct a verdict. Our reasons for this holding will be briefly stated.

The contention of the plaintiff below was that the molasses was spilled upon her trunk while in the care of the railway company and permeated the joints or cracks thereof and thus reached the interior and spoiled the contents. The insistence of the railway company primarily was that the contention of Mrs. Justice was an impossible one, and that its improbability or absolute untruthfulness was established by the physical condition of the trunk. This trunk was before the lower Court and was certified to this Court as a part of the record. It is insisted by the railway company that an examination of the trunk demonstrates that the fluid was originally on the inside and that it could not have entered from the exterior.

It would seem at first view that we have the case of two theories of fact presented, one of which, and that most favorable to the plaintiff, was accepted by the jury. Upon closer scrutiny, however, we are brought squarely to the question as to whether Mrs. Justice presented any material and credible testimony to support her contention that her trunk was permeated by molasses entering from the outside. The trunk is a physical fact, the condition and appearance of which cannot be denied or its evidential force weakened by any oral statements. After a care-

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ful inspection of the trunk we have reached the conclusion that the theory of the plaintiff below is unbelievable and is without material evidence to support it, and that the Circuit Judge should have taken the case from the jury. Our opinion is that the fluid which did the damage was originally in the trunk and that it did not reach the interior from any outside source while in the custody of the railway company.

If there is an equilibrium in two suggested probabilities, that is to say, if the one theory is just as probable as the other, and the proximate cause would have to be guessed at by the triers of the facts, the case should not be submitted to the jury at all. This is plain. But when, instead of having merely a balancing of probabilities, we have a decided tilt toward that probability which negatives the plaintiff's right of recovery, there is greater reason why the jury should not be permitted to speculate.

It seems to be now firmly established that appellate courts may disregard impossible or *palpably* improbable testimony and treat it as no evidence: *Quotaing v. U. S.*, 140 U. S., 417; 35 L. Ed., 501. Tested by this rule, plaintiff's explanation of the seeping of the fluid from the outside must be discredited. This was and is demonstrably impossible, and no Court could proceed to judgment satisfactorily under the circumstances.

It seems to us that another rule is or should be operative: Positive testimony should be weighed in connection with its circumstances and with the situation to which it has reference; and if these circumstances demonstrate absolute untruthfulness of the testimony, then the statement of fact, however positively made, should be disregarded: *Atlantic Works v. Brady*, 107 U. S., 192, 27 L. Ed., 438.

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There is such a thing as non-proof notwithstanding the bringing forward of testimony. By this is meant the absence in the testimony of that which appeals to the belief of the trier of the cause, or the presence of circumstances which destroy human testimony as of evidential value. In the case at bar the latter feature is prominent. The unalterable physical appearances destroy the positive statements, and as these physical facts overwhelm the theory of the plaintiff, there is no proof. Hence a case of non-proof, notwithstanding an offering of witnesses or of testimony so-called.

We must not be understood as attributing deliberate falsehood to the plaintiff and her witnesses. We simply say that they must be mistaken, or that Mrs. Justice overlooked or forgot a circumstance which could have explained the spilling of the fluid into the trunk. In her chagrin she seeks to cast the blame on someone else. Not an unusual thing with witnesses of certain temperament.

The judgment of the lower Court is reversed and the cause dismissed with costs.

Chumley v. Railroad.

MRS. WINCY CHUMLEY V. LOUISVILLE & NASHVILLE
RAILROAD.

Writ of certiorari denied by the Supreme Court, 1914.

1. *DECLARATION. Duty of pleader as to setting forth cause of action.*

A widow suing a railway company for the negligent killing of her husband must aver specific facts showing wherein the company owed her husband some duty the breach of which caused his death. General averments of negligence where no relation existed between the deceased and the company will not suffice.

2. *SAME. Demurrer to a declaration brought for killing trespasser.*

A declaration setting forth the fact that the husband of the plaintiff had been killed by ordinary negligence of a railroad company while the husband was in the position of or occupying the attitude of a trespasser is demurrable. And a declaration which shows that the decedent either assumed the risk of his position or was guilty of proximate contributory negligence is demurrable, notwithstanding the general averments of breach of duty upon the part of a railway company.

3. *SAME. Declaration disclosing wrongful death in another state demurrable, when.*

It is incumbent upon a party suing in this State for the wrongful death of another in a foreign State or jurisdiction to aver the existence of a constitutional or statutory provision preserving a right of action. Otherwise it will be presumed that the common law of the foreign State prevails, and that the right of action abated with the death of the party.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

Chumley v. Railroad.

JAS. T. MILLER for Plaintiff in Error.

F. M. BASS for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

MRS. CHUMLEY, as the widow of one Ed Chumley, brought this suit to recover damages for his alleged wrongful death at the hands of the defendant railway company in Alabama. The Circuit Judge sustained the demurrer to the declaration presented by the company and dismissed the suit. She excepted and appealed, and is here assigning errors upon the judgment of the Court.

The declaration contains two counts. The first one in substance averred that in July, 1913, defendant was operating as part of its system a railroad with rolling stock at and near a place called Adger, in Alabama, and that especially the company was operating a freight train at this place, and that her husband did ride on the side of said freight train pursuant to an invitation of the defendant, and that while so doing and exercising ordinary care the defendant ran its train near an extended platform, the striking of which threw her husband to the ground and mashed and mangled him so that he died. The second count is a repetition of the first with the exception of stating that instead of an invitation to ride, he was on the side of the freight train with the knowledge and consent of the railway company, its officers, agents and servants.

The prominent fact set forth is that Chumley was riding upon the side of a freight train. This clearly implies that he was swinging to a box or gondola car, with his body extending outward. It cannot be denied but that he was well aware of the danger of the situation; especially must it be conclusively inferred that he knew of the existence of

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permanent structures adjacent to the track and near enough to endanger his person while traveling. We have then the case of a passenger who deliberately takes a position fraught with the gravest danger even upon the best regulated railroads of the country. Such conduct can be characterized as reckless and foolhardy only. There is no pretense that he was commanded to take this position, or that he was directed by the chief officer of the train to place himself in such situation.

The legal consequence is plain from two points of view. The assumption of risk of injuries is not limited to the relation of master and servant. The proposition may be invoked in almost every jural situation. There can be no doubt that Chumley voluntarily assumed the risk of injury from his position, especially the risk of injury from the ordinary and prudent operation of the train. *Volenti fit non injuria.*

Again, no man would in the exercise of ordinary care and prudence take such a position, even at the command of a conductor or a superintendent, unless he sustained the relation of a servant to the company. Consequently, Chumley was guilty of the grossest contributory negligence such as would bar any right of action which might survive. In this view it is wholly unnecessary to enter upon a discussion as to what constituted an invitation, and also of the reciprocal duties of the inviter and the invitee.

Again, a majority of the Court are of the opinion that the declaration in this case is so worded as to be diaphanous, and that it sets forth by unavoidable inference the situation of a mere trespasser to whom no duty with respect to permanent structures was owing. At all events, the case of a bare licensee is the very strongest interpretation that can be placed upon the declaration when construed in the light of those things which all men and all Courts

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know. There is no pretense that Chumley had been accepted as a passenger, or that he was paying anything for the privilege of riding. There are absent all averments upon which a duty owing by the railway to Chumley could be predicated. Hence, the declaration falls short of setting forth a cause of action. It is not sufficient to aver generally that the company wrongfully and negligently injured him; the declaration must go further and allege facts from which the duty of ordinary care toward the injured one arose. *White v. Railroad*, 24 Pickle, 739.

It is not worth while for us to load this opinion with citations of the scores of cases which have direct bearing upon the many aspects of this case. A few will suffice. A declaration which reveals the fact that the injured one either assumed the risk or was guilty of contributory negligence is demurrable, notwithstanding its amplified statements of negligence and breach of duty. *Brewer v. Coal Co.*, 13 Pickle, 615. That a party riding upon an exposed or dangerous part of a train, even with knowledge of the conductor, assumes the risk or is guilty of contributory negligence, is established by the following: *Railway Co. v. Wilson*, 4 Pickle, 316; *Railroad v. Meacham*, 91 Tenn., 429; *Railroad v. Hay*, 10 Pickle, 384; *Railroad v. Williford*, 7 Cates, 110. See also *Railroad v. Rogers*, 39 S. W., 383, Texas case; *Favre v. Railroad*, 91 Ky., 370; *Railroad v. Sickings*, 96 Am. Dec., 320. See also our own case of *Meyere v. Railroad*, 2 Cates, 166. This latter decision deals with the assumption of risk and contributory negligence of a paying passenger.

Recurring to the question as to whether or not plaintiff below by general language set forth enough to call for pleas in bar, the majority are persuaded that the presumption against Chumley's having been rightfully on the train was and is so great as to justify the repelling of his widow for

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failing to specify some fact upon which a duty toward her husband from the railroad arose. Freight trains are not adapted to passengers, and were not designed for their use. Conductors of such trains have no implied authority to accept passengers thereon; and it seems that no one short of the railway company itself, or its traffic manager, can thus convert a freight train into a passenger train. Hence, the logic of requiring a stranger who is hurt while riding on a freight train to set forth with particularity those facts upon which he predicates the existence of a breach of duty giving him a right of action. See 37 L. R. A. N. S., 421, note. There is wisdom in the common law precept that all presumptions are against the pleader.

Lastly, we feel constrained to note another insuperable defect in this declaration. The husband of Mrs. Chumley was killed in Alabama, and of course her case must be determined by the laws of that State. *Railway Co. v. Lewis*, 5 Pickle, 235; *Railroad v. Spaberry*, 9 Heisk., 852. We are bound to presume that the common law of Alabama prevails, and is the same as that of Tennessee. This right must be preserved by statute or constitutional provision of the State in which the party was hurt; and in a suit in a foreign jurisdiction it is indispensable that the pleader aver the existence of this right and found his cause of action upon the statute or constitution of the State in which the injury was inflicted. Failing so to aver these saving enactments the Courts of the State in which the action is brought must presume that they are not in existence. A declaration omitting these averments states no cause of action, and is of no efficacy to support a judgment at any time; and we are persuaded that this defect is so great as to require a pronouncement to this effect in any Court to which the declaration is submitted for construction, whether this be in a *nisi prius* Court or in a reviewing

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tribunal. The learned counsel drafting this declaration overlooked this requirement, as did the counsel demurring to the declaration in the Court below. We feel constrained, however, to make this omission one of our reasons for holding that the declaration fails to aver a cause of action.

It results, therefore, that the judgment of the lower Court sustaining the demurrer and dismissing the suit is affirmed with costs.

M. E. HEGGIE v. J. W. BARLEY, ADM'RS, ETC.

Writ of certiorari denied by Supreme Court.

(Knoxville. September Term, 1914.)

1. ACTION FOR PERSONAL INJURIES RESULTING IN DEATH. *Action for benefit of father for death of child he had abandoned and failed to provide for.*

Under our statutes providing that the right of action which a person who dies from injuries received from another would have had if living shall pass to designated relatives, or to a personal representative for benefit of the designated relations, a suit may be maintained by a personal representative of a deceased child for injuries resulting in its death, the recovery to be for the benefit of the father, although the father had abandoned the child and failed to provide for it, and the child's mother had obtained a divorce from him before the child was injured.

2. SAME. *Same. Damages not mitigated because of father's neglect.*

Such desertion by the father and failure by him to provide as set out in the preceding headnote will not go in mitigation of damages for the death of the child where his act did not contribute to such death.

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3. SAME. *Damages not mitigated by neglect of physician.*

Damages for injuries resulting in death will not be lessened by neglect of a physician attending the injured party, the party inflicting the injuries being responsible only for the injuries inflicted by his acts, or the acts of his servant.

4. INSTRUCTIONS TO JURY. *Special request properly modified by eliminating immaterial matters.*

A special request submitted to be charged to the jury containing matters proper to be charged and surplusage may be modified by the trial Court by leaving out the surplusage, and then given in charge as modified.

FROM HAMILTON COUNTY.

Appeal from the Circuit Court of Hamilton County.
NATHAN BACHMAN, Circuit Judge.

SIZER, CHAMBLISS, CHAMBLISS & CHAMBLISS, and MURPHY & PRIDE for Plaintiff in Error.

MURRAY & PRIDE for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

J. W. BARLEY, suing in his capacity as administrator of the estate of Raymond Gaines, deceased, obtained a verdict in this case for \$5,000.00, but the Circuit Judge suggested a remittitur of \$1,500.00, which was accepted, and judgment was rendered in his favor for \$3,500.00. M. E. Heggie, the defendant below, against whom this judgment was rendered, duly made his motion for a new trial, and, it being overruled, appealed to this Court, and has here assigned errors to the number of eleven. Many of the assignments raise the same question, and, for that reason, we

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will, in this opinion, consider the questions raised by the assignments rather than the assignments seriatim.

The facts necessary to be stated to intelligently consider the assignments are as follows:

Raymond Gaines, a child three years and five months old, was, with his mother and older brother, making his home with his grandfather, the defendant, J. W. Barley, the father of his mother, at the time of his death. The grandfather's business was that of peddling in the city of Chattanooga, where he lived. On June 10, 1910, he started out in his business as a peddler, and took with him the little boy, Raymond Gaines. According to his testimony and the testimony of other witnesses, he stopped on the sidewalk on Rossville Avenue near the point where that avenue is crossed by Washington Street, his object in stopping there being to sort some beans that he meant to take with him on his trip as a peddler.

While engaged in sorting the beans a man appeared on the other side of the street with ice cream and frozen dainties to sell. The child had been accustomed to get ice cream from the man, and, on seeing him, started across the street toward him. While attempting to cross the street it was run against, or run over by a horse or delivery wagon in the service of plaintiff in error, Heggie, and one of its feet so seriously wounded and bruised, either by the horse in the delivery wagon stepping on it or by a wheel of the wagon running over it, that just one week thereafter it died. This suit was brought to recover for injuries to and the death of the child, the declaration alleging that the driver of the delivery wagon "recklessly, negligently, carelessly, wantonly and wrongfully, while in the line of his duty and performing the services of the defendant, drove against, upon and over deceased," and stated that recovery was sought for the use and benefit of Eugene Gaines, the father of the child.

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The father, it is disclosed in the evidence without contradiction, had deserted his family something like two years before the death of the child, and had thereafter in no way contributed to its support and maintenance. It is further shown by the evidence that Eugene Gaines had neglected to support his wife and children before he deserted them, one of the witnesses saying that he would not work, and another describing him as a natural-born thief. It was because of his failure to provide for his family that his wife and children were forced to go to Mr. Barley's to live. In fact, the only commendable trait that the father possessed, so far as this record shows, was displayed by his being kind toward the children while he was with them. The mother of the deceased child says that he was good to the children; that he would take them out, by which we understand that he would care for them to the extent of seeing that they were not run over or hurt while with him, and would give them exercise, but this she says was "about the only thing he would do." She, the mother of the child, had obtained a divorce from its father before the child was injured; the grounds of the divorce being willful and malicious desertion, failure to provide, and cruel and inhuman treatment, the cruelty alleged consisting in cursing the wife and calling her vile and vulgar names.

That the child was run over by Heggie's horse or delivery wagon is not disputed, but as to whether the driver of the dray or delivery wagon was at the time negligent or otherwise the evidence is in conflict. According to several of the witnesses offered by plaintiff below he was driving at such a fast gait that it might be said to be reckless, as one of the witnesses characterized it, and was looking backward rather than forward immediately before and at the time the delivery wagon ran over the child; while, according to the testimony of the driver himself and some of

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the other witnesses, he was driving on the right side of the street and at a reasonably slow speed, and was looking ahead. The evidence is also in conflict as to what Mr. Barley, the custodian of the child, was doing at and preceding the time of the accident. According to the swearing of Mr. Barley, and others, he was, as already stated, on the sidewalk sorting beans when the child, seeing the ice cream wagon on the opposite side of the street, started to cross the street to it, and was run over in the manner just indicated; and, according to these witnesses, the child had just started across the street; while, according to some of the testimony offered by defendant below, Mr. Barley was in, or had just been in, a saloon which it appears was near the scene of the accident, and the child started across the street while he was thus giving his attention to other matters than the sorting of the beans. Mr. Barley says that "the child had just momentarily got out of my sight," and that it had gotten only about ten feet from him when it was run over.

It is most earnestly insisted on behalf of plaintiff in error that there can be no recovery in this case because of the conduct of Eugene Gaines, for whose benefit the suit was brought; first, because it would be against public policy to permit one who has acted toward his child as Gaines had acted to recover; and, second, Gaines having repudiated his obligations to the child, cannot derive a benefit from its death; and, third, that he cannot take advantage of his own wrong. This view of the case is presented in many assignments. We are clearly of opinion the contention is not sound; our statutes providing for recoveries for personal injuries negligently inflicted resulting in deaths, and designating for whose benefit such recoveries may be had are clearly in the nature of statutes providing for the descent and distribution of estates, and

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we are of opinion that the Courts can no more inquire into the worthiness or unworthiness of such beneficiaries in such personal injury cases than they can inquire into the worthiness or unworthiness of those who are designated as beneficiaries of the estates of decedents, and that the Courts cannot deny relief because of unworthiness in either case unless authorized so to do by some statute. We know of no statute that would deprive the father of the right of recovery in this case. If the Courts could and should inquire into the worthiness or unworthiness of the father when he seeks to recover because of the negligent killing of a child, we see no reason why they could not and should not make such inquiry when such suit is brought on behalf of any other relative ;and if the cruelty of the father in failing to provide for and in deserting his child could be inquired into in such action for the purpose of defeating a recovery, we fail to see why his conduct toward it while living with it might not be inquired into for the same purpose. It is conceivable that a parent living with a child might be even more cruel to it than if he had deserted it, and if his conduct in deserting the child is to be inquired into, certainly his conduct while living with it should likewise be inquired into ; and if the cruelty of the parent toward the child can be inquired into for the purpose of wholly defeating a recovery, then why would not a less amount of cruelty, although not sufficient to wholly defeat a recovery, be a pertinent matter of inquiry for the purpose of lessening the amount thereof. Again, if the cruelty of a parent can be looked to to defeat or lessen a recovery, why would not the kind and affectionate treatment of a parent toward his child be a pertinent point of inquiry for enhancing damages ? It requires but casual examination of the question to show that if the position of plaintiff in error is correct in principle, then in any and all cases of the character

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of the one under consideration the collateral inquiry of whether the beneficiary has been kind or unkind to the deceased would be pertinent, and such collateral inquiries would always be gone into by one or both sides of every such case to the extent of beclouding and overlooking the questions necessarily controlling. We think it clear that the contention is not sound.

It is also complained by the assignments of error that the trial Court failed to charge the jury on the subject of negligence which contributed only remotely rather than proximately to the death of the child; the contention being that the Court should have charged the jury that such remote negligence, though not barring a recovery, would mitigate the damages; and in connection with this contention it is said that the Court committed error in charging the jury that the plaintiff was entitled to recover "such an amount as would compensate him for the life of the child," in fixing which amount the jury should take into consideration the mental and physical suffering, and look to the age of the child, its expectancy in life, and "fix such a sum as would represent the money value of the child." The contention is that the charge thus given, and the failure to charge on the question of negligence remotely contributing to the death of the child, removed from the consideration of the jury any of the contributory negligence of the father, and of his attitude toward the child. Yet, as we have already held, the matter of the father's attitude toward the child was not a proper matter of consideration. Further, as to any remote contributory negligence on his part, there is nothing to show any such negligence. There is absolutely no evidence showing any connection between his conduct toward the child and its being injured, unless the fact that he had deserted it, and that it was taken to its grandfather's, and that the grandfather had it with him on

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the day of the accident amounted to such connection, and we think it clear that these matters are too remote for any such purpose. While it is true the grandfather, in whose custody the child was at the time injured, might have been guilty of the character of negligence referred to, and while there was some, though very slight, evidence tending to show such negligence, and for that reason some occasion for a charge on the question of such remote negligence on his part, the charge as to the effect of the negligence of the grandfather which proximately contributed to the injuries was given just as announced in *Bamberger v. Railway Co.*, 11 Pickle, 18, and the charge as to the measure of damages was correct so far as given. In this situation, under the well-settled rule of law that before the trial Court can be put in error for such failure to charge there must be a request for further instructions, we are of opinion there was no error in failing to charge on the question of remote negligence, there being no request for such charge.

Another contention is that the physician in charge of the child up until the morning of its death left the city and another physician was called in, and that the leaving of the first physician contributed to its death, and that the jury should have been charged that if it did so contribute, the defendant could not recover. We need not dwell on this assignment. In the first place, there is absolutely no evidence even tending to show that the leaving of the first physician contributed to the death of the child; and in the second place, if it had so contributed it would not relieve the defendant from the responsibility for the acts of his servant.

Defendant submitted a special request at the conclusion of the Court's charge asking the Court to instruct the jury that defendant below had a right to use the streets of the city with his wagon and horse, and that the driver, in the

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performance of the services of his employer, had a right to be on the street where the accident occurred, "and if you find from the evidence that the driver was a competent driver and handler of such wagon and horse, or that under all the facts and circumstances defendant Heggie believed him to be competent, and had no reason to believe otherwise," and the driver was exercising ordinary care in driving at the time of the accident, and the child suddenly appeared in front of the horse and wagon, and the driver did what an ordinary cautious and prudent person would have done to avoid the accident, there could be no recovery; but the Court condensed the request so as to leave out the matter of defendant Heggie's believing the driver to be competent, but gave the substance and essential elements of the balance of the request. His so doing is complained of. We are of the opinion the modification of the request was proper, for the reason that if the driver was exercising that degree of care characterized as ordinary care, and the child appeared on the street in front of his horse and wagon so suddenly that the accident could not be averted there could be no liability, regardless of any other considerations, and the request as modified so instructed the jury. In other words, the request, as modified, gave to plaintiff in error the full benefit of the material parts of his request, and left off immaterial matters, and of this he cannot successfully complain.

Still another assignment is to the effect that "the verdict is so extraordinary, unnatural and extravagant as to evince passion, prejudice or caprice on the part of the jury," which we think is the equivalent of the usual assignment that the verdict is so *excessive* as to indicate passion, prejudice or caprice. So treating it, we are of opinion it has merit. Under all the circumstances, we are of opinion that any amount in excess of \$2,500.00 evinces passion, preju-

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dice or caprice, and for that reason a further remittitur of \$1,000.00 is suggested. If that is accepted a judgment will be entered here for \$2,500.00, while if it is not accepted the judgment of the lower Court will be reversed and the case remanded. If the remittitur is accepted the plaintiff in error will be taxed with the costs; otherwise, the costs of this appeal will be taxed to defendant in error.

I. H. NELSON v. ELIJAH THEUS, ET AL.

Writ of certiorari denied by the Supreme Court.

(*Jackson*. January Terms, 1914 and 1915.)

ON THE HEARING IN 1915.

1. WILLS. *Gift by, to widow during life or widowhood valid.*

A gift by a husband in his will to his widow during life or widowhood is valid, and a gift over to his children "after her (the widow's) death or widowhood" becomes effective on her remarriage.

2. HOMESTEAD. *Several adjoining tracts considered as one in assigning.*

Where the deceased husband had acquired at different times separate but adjoining tracts and lived on and treated them as one continuous boundary to the time of his death they will be treated as one tract in assigning homestead to the widow.

3. SAME. *Nature of the widow's right to, before assigned and after assigned, and her sale of.*

Homestead before assigned to the widow is a mere right hovering over the lands not rising to the dignity of an estate, but after assigned to her, either by operation of law when the lands are worth less than \$1,000.00 or otherwise where they are worth more, becomes a life estate subject to be sold by the widow.

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4. *SAME. When homestead constitutional provisions and statutes will be liberally construed and when not.*

Constitutional provisions and statutes providing for homesteads will be liberally construed when the question of the right to a homestead is at issue in a case where the claim is set up by the widow and children or the debtor meant to be protected, but will not be liberally construed when the claim is set up by a mere purchaser of that right, and when it does not appear that those primarily meant to be protected, viz.: the debtor or the widow and children, will not receive the benefits of it if asserted.

ON THE HEARING IN 1914.

5. *COUNTY COURTS, APPEALS FROM. Appeals from county courts lie only from final decrees.*

County Courts can grant appeals only from final decrees, as the statute conferring power on Chancellors and Circuit Judges to grant appeals in their discretion from decrees not final, but determining the rights of the parties in certain cases, has no application to county courts.

6. *SAME. Same. Confer no jurisdiction on appellate courts.*

Such unauthorized appeals as that set out in the last headnote confer no jurisdiction on appellate courts.

7. *COUNTY COURTS. Practice in, suggested where title to realty involved.*

It is suggested that where a sale of realty is sought in a County Court and a question of title arises which might affect the price, that, as the County Court has no jurisdiction to pass on the question of title, a bill may be filed in chancery to settle the question of title, and the case be held in the County Court till the question of title is settled, when the sale can be proceeded with in the County Court.

FROM MADISON COUNTY.

Appeals from the County Court of Madison County.

A. W. STOVALL, County Judge at time second appeal granted, and MCCORRY, County Judge at time first appeal granted.

Nelson v. Theus.

W. N. KEY for Complainant.

D. W. HERRING and W. T. ROGERS for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

I. H. NELSON brought this suit in the County Court of Madison County, and, as originally brought, the sole object was to sell a certain tract of land containing about 185 acres, subject to what was alleged to be a life estate, that the proceeds might be partitioned among the parties in interest. But, after the bill was filed, and during the progress of the case in the Court below, Nelson became the purchaser of what was charged in the original bill to be the life estate, subject to which it was sought to sell the lands; and, on the theory that that interest was a homestead or right thereto vesting in a widow on the death of her husband, and that complainant Nelson was entitled to have it set apart to him, an agreement was made in open Court stipulating that the bill be treated as so amended as to charge that that interest had been acquired by complainant, and to pray that a homestead to the value of \$1,000.00 be set apart out of the lands for the benefit of complainant. Defendants denied the right of complainant to that measure of relief; and the question at issue before this Court, to which the case was appealed from a decision of the Hon. A. W. Stovall, County Judge of Madison County, denying the right of complainant to homestead, is whether complainant is entitled to have the homestead set apart to him. The facts giving rise to this question are as follows:

One Peter Theus died testate in 1899 or 1900, the owner of a tract of land containing about 185 acres, the title to which had been acquired by him by separate and different purchases; but all the separate purchases were

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of tracts so adjoining as to form one continuous well-connected body of land. These lands were purchased by Peter Theus between the years 1872 and 1881, and he had made his home thereon for many years preceding the time of his death, and was living there at the time he died. These lands, taken as a whole, had cost Peter Theus more than \$1,000.00 and were worth more than that at the time of his death, and have been continuously worth more ever since. They were worth at the time of his death something in the neighborhood of \$1,500.00, we find from the evidence, and have been constantly increasing in value ever since. At the time of his death, deceased left a widow and fourteen children. His will, which was probated after his death, contains the following provision: "I bequeath to my beloved wife, Katie Theus, all my real estate and personal property during her lifetime or widowhood; after her death or widowhood said real estate and personal property to be equally divided among my bodily heirs." On December 19, 1912, Katie Theus, who had remained the widow of Peter Theus from the date of his death, and was then still his widow, executed a deed of conveyance to complainant, I. H. Nelson, what is mentioned in the deed as all her interest in the boundary of 185 acres, describing it by giving the county and district in which located and the names of adjoining land owners, the deed treating the whole boundary as one tract, and concluding the description by referring to the lands as "containing 185 acres, more or less, being all the lands of which Peter Theus was the owner at the time of his death and on which he resided at the time of his death and on which I now reside. It being the same land devised to me and others by the will of my husband, Peter Theus, deceased."

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In February, 1913, the exact day of the month not being given, the widow Katie Theus married, becoming the wife of one Dempsey Weddle; and, of course, under the terms of the devise to her by her former husband, ceased to be the beneficiary under the will, and any and all property which she had received by virtue of that will, under its terms, passed to the bodily heirs of testate to be equally divided among them, such provisions in wills as that in the will in question being valid. *Hawkins v. Skaggs*, 10 Hump., 31; *Hughes v. Boyd*, 2 Sneed 512; *Duncan v. Phillips*, 3 Head., 415; *Overton v. Lea*, 108 Tenn., 505.

Under this state of facts it is the contention of complainant that he succeeded, by his purchase from Katie Theus, to her right to have homestead set apart to her, and that the County Court of Madison County committed error in not according to him that right. On the other hand it is the contention of defendants in error that when Katie Theus by her deed divested herself of all interest in the lands before homestead had ever been assigned to her, her right to have it assigned ceased, and that her vendee, the complainant Nelson, did not succeed to and does not now have that right; and the contentions of the parties are presented to this Court in able briefs which we have found very helpful. Counsel on both sides have pursued the commendable practice of going directly to the question at issue and presenting it and it alone.

The question to be determined has not been passed on by our Supreme Court on a state of facts parallel to those now involved, but we are of opinion that principles have been settled and announced in Tennessee which put the question at rest.

First, we are of opinion that, all the lands lying in one body, and all having been occupied by Peter Theus as

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one tract preceding and up to and at the time of his death, as the evidence shows the facts to be, we must consider the lands as one boundary, and cannot consider them as separate tracts such as they were before Peter Theus acquired title to them, as it is insisted we should do in support of one theory of counsel for complainant. See *Smith v. Carter*, 16 Lea, 527, as explained in *Moses v. Groner*, 22 Pickle 121; and see opinions in the case of *Moses v. Groner*, by the Court of Chancery Appeals, reported in 37 S. W., 1031, and 59 S. W., 161; 21 Cyc., 493-4.

Then treating the 185 acres as one tract we will pass to the rights of complainant to the homestead.

In *Bricoe v. Vaughan*, 103 Tenn., 308, the question at issue was stated in the opinion of the Court in the following language: "What are the rights of the alienee of a homestead after it has been set apart by metes and bounds or other equivalent proceedings?" The lands involved in that case, and as to which this question was to be passed on, were worth less than \$1,000.00, so that under the Tennessee cases, it was not necessary to physically set them apart to the widow as homestead, the law in effect doing that (*Beeler v. Nance*, 126 Tenn., 589 and cases there cited). Yet, in speaking in the *Briscoe-Vaughn* case of the status of the widow entitled to homestead in lands worth more than \$1,000.00, it was said that, "before the assignment there was *no freehold estate and no interest, but a mere right*, after the assignment there is an interest and estate for life in each case. If this be correct, we can see no reason ~~why~~ such homestead, *after it is set apart by metes and bounds*, or if the tract is worth less than \$1,000, after it is sold subject to homestead, may not be aliened as well as a dower estate."

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Then, after discussing the question further, the Court concluded: "We are of opinion, therefore, that a homestead, *when once assigned in any proper mode*, is a full and absolute life estate in the land embraced, with every right of use or sale that attaches to any other life estate." The italics in these quotations are ours.

In *Coile v. Hudgins*, 109 Tenn., 217, is found the following: "In *Briscoe v. Vaughn*, 103 Tenn., 308 (52 S. W., 1068) it is held that the homestead stands upon a different plane or basis after its assignment than before.

"Before its assignment it is a mere right which hovers over the whole land, and does not rise to the dignity of an estate. After assignment it becomes a life estate, and can be rented, leased, or sold, and the party to whom it is thus leased, rented, or sold will have the same estate as the homesteader had previously."

In *Grier v. Canada*, 119, Tenn., 17, 40, after announcing certain propositions as well settled, our Supreme Court said: "It is also well settled that homestead, when assigned, is transferable as a life estate. *Cowan v. Carson*, 101 Tenn., 523, 50 S. W., 742; *Delk v. Yelton*, 103 Tenn., 480, 53 S. W., 729; *McCrae v. McCrae*, 103 Tenn., 721, 54 S. W., 979."

Referring to the case of *Cowan v. Carson*, 101 Tenn., 523, cited in support of the proposition just quoted from *Grier v. Canada*, to the effect that homestead, *when assigned*, is transferable as a life estate, the following proposition is found: "As an open question, we think there is no doubt that the widow to whom homestead is assigned may alien her right in the property without working a forfeiture. The alienee will take as she does, and hold exactly as she did."

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Another case very much in point here is that of *Carver v. Maxwell*, 110 Tenn., 75, it being in point on the proposition that it is the assigning and setting apart of the homestead, either by virtue of the provisions of our statutes, where the lands in which the right exists are worth less than \$1,000.00, or by the means directed by statute where they are worth more, that gives to the claim to homestead *the character of a life estate*, the language used being as follows: "It is next insisted that the Court of Chancery Appeals erred in holding that the said Louisa had a life estate in the lot in question by virtue of her homestead right, because, as it is urged, the homestead was never assigned. The Court of Chancery Appeals found as a fact that the lot was worth less than \$1,000.00. This being true, there was no necessity for the assignment of the homestead *in order to give the property that character, and to vest the life estate.*" Italics ours.

In all these quotations it is seen that our Supreme Court expressly recognizes and speaks of the homestead as being only a mere claim until assigned, and as being an estate subject to conveyance by the widow, only after assigned, the terms used being such as to unmistakably imply by the equivalent of expressly so saying that until assigned the homestead claim is neither an estate nor can be transferred; and Katie Theus, the widow of Peter Theus, never having had homestead assigned to her out of the lands left her by her deceased husband, and the lands left being worth more than \$1,000.00, if these expressions, and others of like character that might be quoted, are correct, it necessarily follows that Katie Theus at the time she made her conveyance to complainant Nelson did not have, *by virtue of any claim to homestead*, an estate in the lands of her husband or an interest therein that could

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be conveyed by her. True, if she had elected to take under the will of her husband an estate during life or widowhood, she would have had thereby an estate that she could have conveyed, but such an estate would have terminated, by the very terms of the will, on her marriage, and her vendee, in so far as such interest might be concerned, could not acquire any more or greater interest or right than his vendor had, and on her marriage that interest would have ceased. We, of course, do not mean to intimate that she was required to elect as between homestead and taking under the will of her husband, it being settled in this state that she was not required to make such election (*Chambers v. Parrish*, 118 Tenn., 739), but are merely referring to the position of complainant if, under the facts of the case, his vendor be treated as having elected to take and taking entirely under the will.

Counsel for complainant relies, however, as an authority for the position that complainant acquired the homestead right of Katie Theus, on the case of *Beeler v. Nance*, 126 Tenn., 589, and that case does announce a proposition which, unless critically examined, appears to support the contention. Yet, when critically and closely examined, it is found the language relied on does not support the contention. In that case the husband had conveyed lands worth less than \$1,000.00, in trust to secure an indebtedness, and his wife had not joined in that trust conveyance. The lands were brought to sale under the trust deed and bought thereat by the beneficiary, and thereafter the husband and wife joined in leasing the lands to another, and the contest was between the purchaser at the sale under the trust deed and the lessee from the husband and wife. It was held by our Supreme Court, speaking through Justice Buchanan, that, for the reason that

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the lands were worth less than \$1,000.00, and, because, under the law, homestead had to be treated as assigned, the purchaser from the husband and wife took the homestead right, notwithstanding the fact that the husband and wife, after making the lease, became non-residents of the state. Justice Buchanan then, in giving another reason why the purchaser from the husband and wife received the homestead, used the language relied on as authority for the contention that complainant in the instant case became entitled to have homestead set apart to him, which language is as follows: "And for the further reason that the homestead right, whether it be a mere floating right in an unassigned homestead, or such right as under our cases has arisen to the dignity of an estate for life in the specific tract of land by reason of facts which the law will treat as an assignment of the homestead in that tract, can only be conveyed by the joint deed of husband and wife, when that relation exists. Section 11, Art. 11, Constitution 1870; section 3798, Shannon's Code; *Cox v. Keathley*, 99 Tenn., 523, 42 S. W., 437."

Now, as already stated, without a careful consideration of this language it will appear to support the contention of plaintiff in the instant case; but when it is borne in mind that in the case in which this language is used, and in the language quoted, reference was being made to lands which had been leased by husband and wife *who were both still living*, and that the floating right in an unassigned homestead that is there spoken of as one that can be conveyed only by the joint deed of husband and wife is the homestead right existing in husband and wife while the relation still exists, and while they are both living, and not the floating right that exists in the widow after the husband's death, the language of Justice Buchanan

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becomes clear, and is no way in conflict with the statements we have hereinbefore quoted from other cases to the effect that the floating right *the widow has after the death of the husband* to homestead in his lands cannot be conveyed. The reason for the distinction in the two cases is apparent; where husband and wife are both living that floating right can be conveyed along with the fee and as part of it, and that interest is the very thing Justice Buchanan was speaking of. Further, it is what is authorized by the very authorities that are referred to in support of the proposition announced by Justice Buchanan, that is our Constitution, section 11, article 11; Shannon's Code, Section 3798, and *Cox v. Keathley*, 99 Tenn., 523. These authorities all have reference to the manner of conveyance *by husband and wife*, and not to the manner of conveyance by the widow who does not own the fee, but who owns only the floating, unassigned right in the homestead; and the case of *Beeler v. Nance*, read in the light of these facts, not only becomes entirely consistent with the authorities we have hereinbefore quoted, but is in line with them. It will be seen in the very language quoted from the case of *Beeler v. Nance*, Justice Buchanan refers to an unassigned homestead right in language that indicates that it is one that has not arisen to the dignity of a life estate, just exactly as the authorities we have quoted from indicate.

It is true that constitutions and statutes providing for homestead are to be liberally construed in favor of that right (*Walt v. Walt*, 113 Tenn., 199; *Jackson v. Shelton*, 89 Tenn., 82; *White v. Fulghum*, 87 Ten., 281); the reason for such liberal construction of constitutional provisions being, as the proposition is announced in *Williams v. Williams*, 7 Baxter, 116, that the homestead is meant, "not merely to protect the husband, as the head of

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the family, in the possession and enjoyment of a homestead, but the protection of the interests of the wife and the minor children constitute a leading consideration."

Such objects also, in the Walt case said to constitute the leading consideration for our constitutional provision for the homestead, are said in *Ren v. Driskell*, 11 Lea, 642, 649, to constitute the object of our statutes on the same question, it being there said, with reference to such statutes, that "The exemption of the homestead is not for the benefit of the debtor alone, but mainly for the helpless members of his household, for whom it was the object of the Legislature to provide shelter and means of support."

Yet this doctrine of liberal construction, both as to constitutional and statutory provisions, has its limitations in application, and is not to be applied for the purpose of protecting those not meant to be protected. That is, the provisions of our constitution and statutes will not necessarily be liberally construed when to do so would not operate to the interest of those primarily meant to be protected thereby, although bearing on a favored subject. For instance, while the homestead right, as we have just stated, is for the protection of the wife and children, an unfaithful wife who had deserted her husband and had been living in another state with another man, though still the legal wife of the husband she had deserted, was held not entitled to the homestead; and to reach that result the ordinary presumption that the residence of the wife is that of the husband was held to not apply in the case of *Prater v. Prater*, 87 Tenn., and while we do not mean to intimate that the situation of the complainant in the case at bar would be looked on with such disfavor as the position of the unfaithful wife in the case just referred to, still it does not appear that to liberally construe our con-

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stitutional and statutory provision under which the homestead is allowed would serve the interests of a wife and child or children in the instant case. So far as the record in this case shows Mr. Nelson has no wife or children, or, if he has either or both, he has other lands in which he could claim a homestead for them; so that no reason appears here for a liberal construction of the law providing for homestead in his favor; and in this regard the case is quite different from that of *Beeler v. Nance, supra*, as in that case the husband and wife, though non-residents of the state, had leased the property and were at the time of the decision of the case, it appears, getting a benefit from it; while in the case at bar the widow of Peter Theus had sold for \$1.00 and other valuable consideration, without any recital as to what they are, whatever interest she had in the estate of her deceased husband.

The very distinguishing fact of the person or persons meant by the law to be benefited by receiving income from the homestead is alluded to as perhaps controlling in the *Beeler-Nance* case, on page 593 of 126 Tenn., by a quotation from *Coile v. Hudgins, supra*, wherein the case of *Carrigan v. Rowell*, 96 Tenn., 185, is distinguished.

Without further elaboration, we are of opinion the decree of the County Court denying the homestead right was and is correct, and it is affirmed, and plaintiff in error is taxed with the cost of this Court. The case is remanded to be further proceeded with, it appearing that the lands have been sold pursuant to the orders of the County Court, and that further steps will be necessary to collect and disburse the money. The costs of the County Court will be adjudged by that Court.

(This case was before this Court in 1914, on an appeal from the judgment of the County Court adjudging the

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rights of the parties and ordering a sale, but before sale was made. Justice Hughes handed down the opinion of the Court then, and in disposing of the case, after stating the facts, the opinion proceeded as follows:)

On the adjudication of the rights of the parties and the making of the order of sale by the County Court and before any further steps had been taken, an appeal was prayed by petitioner, Nelson, from so much of that judgment or decree as held that upon the marriage of the widow all the interest she by her deed had conveyed to petitioner terminated, and refused to assign or set apart homestead therein for the benefit of petitioner. This appeal was granted, as the judgment of the Court shows, by the County Judge in the exercise of a discretion assumed by him to be possessed under the law. Did that Court have power to grant such appeal?

By a legislative enactment passed in 1835 and brought forward in the Code of 1858, and found in Shannon's Code, Section 4889, it is provided as follows:

"The Chancellor or Circuit Judge may, in his discretion, allow an appeal from his decree in equity causes determining the principles involved and ordering an account or a sale or partition, before the account is taken or the sale or partition is made; or he may allow such appeal on overruling a demurrer; or he may allow any party to appeal from a decree which settles his right, although the case may not be disposed of as to others."

It is seen that this statute applies, by its express terms, to only "the Chancellor or Circuit Judge," and does not apply to County Judges.

In the case of *Cawthorn v. Searcy*, 12 Lea, 649, a partition proceeding in a County Court, the Court had ordered lands sold, and before sale was made an appeal was prayed

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and granted to the Supreme Court. In that case, as in the case at bar, neither counsel relied on or even called attention to the fact that the appeal had been improperly granted, but the Supreme Court, notwithstanding that fact, held that the statutory provision just quoted herein had no application to County Courts, but, on the contrary, was by its express terms limited to Chancellors and Circuit Judges, and further, that in the absence of any statute conferring the right, the appeal could be prosecuted from a final decree only, and that it, the Supreme Court, was without jurisdiction of the case. To the same effect is the case of *Burton v. Woods*, 16 Lea, 260.

In the face of these holdings it is clear that this Court is without jurisdiction of the case at bar, unless it has been conferred by some statute other than that just set out authorizing appeals in discretion. Our investigations fail to disclose any statute authorizing the County Judge of Madison County to grant such appeals. We have looked to Acts 1905, chapter 14, creating the office of County Judge for Madison County, and fail to find any such authority given therein. By that act the County Judge is given only such powers as are usually given to County Judges or possessed by County Courts, including the power to grant appeals, but no power is given to grant appeals in discretion. We are therefore constrained to hold that we are without jurisdiction in this case, and to dismiss the appeal.

We fully realize that if the lands are sold in this proceeding in the County Court before an adjudication has been had of the homestead question they will not likely bring their full value; and we would gladly pass on the question were it before us in a way that our adjudication could mean anything, but any effort to pass on it would simply be a nullity and leave the parties in no better con-

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dition than they are now in, as we are totally without jurisdiction. An adjudication, or attempted adjudication, even by consent, with the case brought here under the circumstances set out, would be a nullity. *Gibson v. Widener*, 1 Pickle, 16.

We suggest to the parties that they are not without remedy, however, As pointed out in *Apple v. Owens*, 1 Chancery Appeals Reports, 135, (specially at pages 147 and 150), this is a question that should be passed on by a Chancery Court, and either of two courses may be taken to attain that end, viz.: A bill may be filed in Chancery to settle this one question, in the meantime this case being held in the County Court, and proceeded with only after the question of homestead has been settled in the Chancery Court; or the bill in the County Court may be dismissed and an entirely new proceeding brought in the Chancery Court; or of course, the parties may, if they so desire, proceed to sale in the County Court and take their chances on the lands bringing their value before the homestead question is settled. The chief advantage in bringing suit in Chancery to settle this question, as is evident, would lie in the fact that the Chancellor might in his discretion grant an appeal before sale, so that the question of Nelson's right to a homestead would be put at rest before the property is put up for sale, and a sacrifice of it be thereby prevented.

Following the course taken by our Supreme Court in *Cawthorn v. Searcy*, *supra*, the appeal is dismissed at the cost of complainant Nelson, it having been prematurely granted at his instance.

GRASSELLI CHEMICAL COMPANY V. MRS. O. M. BETTIS.

Affirmed by the Supreme Court, 1914.

1. MASTER AND SERVANT. *Warning. Experienced servant as to ordinary risk not required.*

It is not incumbent upon a master to warn or instruct an experienced servant as to the ordinary and usual risks of employment, although the employment is fraught with danger.

2. ASSUMPTION OF RISK.

A servant accepting work assumes the ordinary and necessary risks of the employment. He also assumes the extraordinary risks if informed of them or knows of them and elects to take up or continue the service.

3. SAME. *Assurance of safety.*

Where the servant is aware of the dangers of his employment or knows them as well as does his master of the hazards, an assurance of safety does not become a material factor in determining the liability of the master for injuries received by the servant while in the employment.

4. SAME.

An assurance of safety given by the master does not relieve the servant of the consequences of an assumption of risk or of contributory negligence where he is injured because of an ordinary risk or of an extraordinary risk of which he was fully aware.

5. SAME.

An assurance of safety cannot be made a ground of recovery where the servant did not rely upon this assurance, but acted upon his own independent judgment.

6. SAME. *Assumption of risk and contributory negligence.*

A servant at whose disposal for his own protection underlings and instrumentalities are placed cannot recover for injuries received where he could by using the underlings and instru-

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mentalities in accordance with directions of his master have avoided injury to himself.

7. SAME. *Negligence of master.*

A master who equips his working place with instrumentalities and furnishes subordinates sufficient to protect the servants engaged in a dangerous employment from injuries is not liable for the consequences of recurrent or continuing dangers if he has instructed the workmen or if they are aware of the methods and means by which they can protect themselves from those dangers.

8. SAME. *Falling banks of earth.*

A master is not liable in damages to a servant injured by the caving in of banks of earth where the servant knew as much or more about conditions as did the master and had opportunity to protect himself from such conditions.

FROM JEFFERSON COUNTY.

Appeal in error from the Circuit Court of Jefferson County. G. McHENDERSON, Judge.

CORNICK, FRANTZ, McCONNELL & SEYMOUR for Plaintiff in Error.

H. N. CATE and FRANK TAYLOR for Defendant in Error.

MRS. BETTIS, as widow and administratrix of O. M. Bettis, brought this suit against plaintiff in error for damages because of his alleged wrongful killing. Verdict and judgment were for \$10,000. The Chemical Company excepted to the action of the Court in refusing to set aside the verdict and dismissing the action, and has appealed and assigned errors.

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The fifth assignment of error, to which we shall first direct our attention, is that the Court wrongfully refused to grant the motion of appellant for a directed verdict made at the conclusion of all the evidence. This assignment makes it necessary to set out such parts of the testimony as tend to support the cause of action of plaintiff below. We must of course exclude for the time being countervailing proof. We are not precluded by this rule, however, from taking into consideration the admitted or uncontroverted or incontrovertible facts developed, from whatever source.

The plaintiff in error is engaged in extensive mining operations near Newmarket, in Jefferson County. At and before the time of the accident out of which this suit arose the company was engaged in mining for what are called zinc carbonates to be found in that community. They are reached or mined by removing surface dirt of thicknesses varying from 10 or 12 feet to 40 or 50 feet. This top layer is removed principally by operating steam shovels, which would take off the entire surface, leaving what is called open cut work. The intestate of plaintiff below was in the service of plaintiff in error at the place named in August, 1912. He was employed and assigned to the operating of a steam shovel. As its name implies, it is a contrivance for the gathering up or lifting up of dirt and carrying it in a dipper or shovel from the place where it had accumulated by nature, and dumping it into a vehicle or at another place, the operation being carried on by means of steam, controlled by an engineer, aided by a fireman. Bettis had been in the service of the company and engaged in this line of work in the territory mentioned and near the spot at which he was killed for many months before the accident. The soil or top covering was of clay sand and revealed a shifting, slippery quality. The

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method by which the work was done was that, after the scraping or beginning of surface removing, the shovel would be put in position so that it could be dipped or driven into the bank which it faced, and would scale the bank to a height of 17 or 18 feet if the bank was so high. The particular shovel operated by Bettis had a sweep of some 25 or 30 feet. After the removal of all dirt within its reach from a stationed place, it would be moved nearer a bank to be worked down, and the same method would be repeated.

If the bank against which Bettis and his associates were working was higher than the reach of the shovel, the overhanging part had to be worked off with a crow-bar or by the use of dynamite. The lower part of the bank would be scooped out, leaving a projection.

Bettis was fatally hurt on the morning of the 28th of August, 1912, while on his steam shovel, by the falling or caving in of the bank against which he had for some days, and on this particular day, been working according to the usual method. He was some ten or twelve feet from the wall of the bank which crumbled and fell. The dipper of his shovel had just been filled and he had stopped the engine and was waiting for a wagon to come into position, when the earth came down upon him and crushed him. The dirt that fell came from the top or near the top. He had shoveled or scooped out about three feet from the lower part of the cut extending up to the reach of the shovel beam. He had his back to the bank at the time and did not have time or opportunity to stand from under. The fireman was only a few feet away and received a slight injury. The son of Bettis, and the chief witness, was some fifteen or twenty feet away in the discharge of his duties in connection with the placing of the wagons. One Hugh Young was upon the bank at or near the place

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from which the earth caved in. With reference to the face of the bank, there is some discrepancy among the witnesses for plaintiff below. The son stated that the bank before the fall was perpendicular. This is at variance with his subsequent statement that his father had scooped out or had gone into the bank at the level of the machine some three or four feet. Kline, another witness, states that there was an overhanging part to the bank.

It is manifest that as the scooping or cutting in at the base progressed against the bank some 25 feet high there would be an overhanging part which had to be disposed of or looked after in some way. The two methods of dynamiting and barring had been followed by this company, but it seems that for some considerable time preceding the accident the barring method had been pursued. There is no controversy but that this was a satisfactory way. Young had been assigned to work virtually under the control of Bettis, while the latter was operating the shovel. It is true that Bettis did not hire him, and did not have absolute control of him. It is nevertheless clear that Young was directed to obey the orders of Bettis and to perform such duties and follow such directions as Bettis should prescribe or give while operating the shovel. Bettis sometimes directed Young to work at the base of the bank and sometimes commanded him to go on top and cut down the bank as the work beneath progressed. It was also developed that Bettis had the right to or assumed the power to call upon Young from time to time to go upon the bank and bar or dig it off at any particular point directed. Bettis frequently did this, directing Young to go from place to place and dig off such overhanging earth as Bettis thought to be dangerous. It was also shown that Bettis would frequently call upon Young from Bettis'

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position on the shovel to bar down any overhanging part of the bank which struck Bettis as being hazardous. It was also brought out that Bettis himself would occasionally go upon this bank as the work progressed and himself examine the surface. Mitchell, the superintendent of the company, testified that Mr. Bettis had the best point of view of anyone from which to judge of the dangers. He also testified that Mr. Bettis was expected to look out for such hazards and to take proper measures to remove the dangers. We are persuaded that this was and is the truth, when considered in connection with the admission of the son that the father was sometimes expected to go upon the bank and look at it himself, and especially when considered in connection with the undisputed evidence that he looked at the bank at intervals as the work progressed and commanded Young to go from point to point and relieve the situation.

For some days preceding the accident the bank had been sliding. Not many days before Bettis' death a quantity of earth had fallen upon the shovel while he was at work; and it is uncontroverted that a vast number of slides had taken place all along the bank beneath or adjacent. Bettis was shown to have been a man of much experience, good judgment and wide observation. The record warrants the conclusion that he knew as much about conditions as any other member of the company. The record also warrants the further inference that he was as cognizant of the hazards as the superintendent and knew as much as he about when conditions were safe or hazardous and what was proper or should be done at any juncture or crisis which might arise. It is unnecessary to state it, but we do so for clearness and consecutiveness, that Bettis and his associates were engaged in making a safe place unsafe and were bringing about the changes which imperiled their

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lives. The inevitable consequence of every step was to create conditions that were more or less dangerous. One of the unavoidable incidents of the work in which they were engaged was the possibility or probability of the tumbling in of vast quantities of earth from the overhead; and not only was Bettis presumptively aware of this and impliedly assuming the risk; he in fact was made aware of it every day and every hour, and was himself provided with the means of minimizing the danger or desisting until the danger was removed. In addition to this it was shown that on Thursday or Friday preceding his death on Wednesday he had gone upon the bank several feet away from the place where he was hurt, and examined it and had pronounced it dangerous; that he knew all along that it was dangerous, and that he was aware of every element of hazard incident to it is just as clearly as any other fact. It was also stated by the son that there would have been no danger at the time his father was killed if the bank had been barred. In other words, he stated that the bank could have been made perfectly safe had it been cut away by the crow-bar.

There is testimony tending to show that some cracks in this bank some three or four feet apart and some quarter of an inch in thickness had been discovered on Thursday or Friday before the accident, and that the father and the son and Superintendent Mitchell had gone upon the surface and examined these crevices. It was then that the father had expressed the opinion that the bank was unsafe, and it is in this connection that the plaintiff below undertook to establish or at least plant the inception of an assurance of safety under which it is claimed that Bettis thereafter labored. There is some evidence that Mitchell made this assurance at this particular time; and it is deducible that this remark was made with reference to the

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conditions surrounding the cracks. But we do not discover any great juristic value in this expression of opinion on the part of Mitchell, for the reason that the work had undoubtedly gone up to or beyond the crevices. Besides, it is clear that many yards of dirt and quite a distance in feet had been removed, and that at the time of the accident Bettis was working under totally different conditions and amidst entirely different surroundings, and that any assurance of safety given five days before could have no application to a condition and a place which had been changed by himself and his associates. There is evidence of some remark made by Mitchell a day or two before the accident that he thought the bank was safe. Conceding this to be true, as of course it would have to be assumed upon a motion for a directed verdict, it remains to be seen whether it would operate a different result from that which would be reached with this factor omitted. That the bank was unsafe or was likely to tumble was known to everybody. Especially was it known to Bettis that as he progressed with the work all overhanging and unprotected earth would tumble down by force of gravity if not barred or chipped off.

It was developed that Mitchell, the superintendent, was a very careful man and passed over and looked at all the operations one or more times daily. He was near the shovel and about the bank looking over the surface of things a very short while before the happening of the accident. It is not shown that Mitchell and Bettis discussed the appearance of the bank upon any other day than the Thursday or Friday heretofore mentioned. The incompetency or inefficiency of Young is not in any way assailed. The clear inference is that he was on the bank subject to the call or order of Bettis at the time the bank caved in.

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After carefully pondering the questions suggested by the above statement of facts we feel constrained to the conclusion that defendant in error had no legal right to demand compensation for the loss of her husband, and that a verdict against her should have been directed. Our reasons for so deciding shall be stated briefly and paragraphically.

1. There is no substantial evidence from which the negligence of plaintiff in error charged in the declaration can be inferred. There is no evidence showing any failure upon the part of the company to take suitable precautions against the happening of this accident. Bettis was a man of age and experience and knew as much about the condition of the bank as any employe and was equipped with the means and instrumentalities and time and opportunity for guarding against such dangers. These considerations must be presumed to have been in the mind of the master. There is nothing here to show that a reasonably prudent master would have done anything else or taken any other precaution than those provided. Under the common law as at present administered masters are liable for their faults or neglects only. Workman's compensation laws must be adopted before injured servants can recover without showing culpable conduct.

2. Plaintiff in error was entitled to peremptory instructions upon its defense of assumed risk. The dangers were open and obvious and were incident to the business. They were as apparent to the servant as they were to the master. They were certainly as well known to Bettis as they were to Mitchell. In addition to this, conditions were continually changing as the result of the operations carried on by Bettis and his associates. It was impossible to keep the mine safe as a stationary place; the likelihood of the earth tumbling down was continually increasing or

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shifting. Nobody knew this any better than Bettis. This was, therefore, an ordinary risk and one incident to the business,—in fact, a hazard which could not have been avoided by the exercise of the utmost care upon the part of the master, to say nothing of ordinary prudence. The inevitable conclusion is therefore that Bettis assumed the risk of the tumbling in of the surface as the work progressed and that his representative cannot sue for injuries received by the happening of this always to be anticipated event: *Brown v. Electric Company*, 101 Tenn., 467; *Riderson v. Rushford*, 41 Minn., 287; *Olson v. McMullen*, 34 Minn., 95; *Swanson v. Railroad*, 68 Minn., 184; *Reiter v. Railroad*, 72 Minn., 225; *Water Company v. White*, 124 Ind., 376; *Griffin v. Railroad*, 124 Ind., 326; *Naylor v. Railroad*, 53 Wisc., 661; *Coralson v. Water Co.*, 8 S. D., 47; *Larich v. Moies*, 18 R. I., 513; *Railroad v. French*, 86 Texas, 96; *Ragan v. Palo*, 62 N. J. Law, 30; *Allen v. Logan City*, 10 Utah, 79; *Bradley v. Railroad*, 138 Mo., 293; *Aldridge v. Furnace Co.*, 78 Mo., 559. Numerous other cases could be used to swell this opinion, but we refrain. The *Brown* case, *supra*, was roundly criticized at the bar by learned counsel for appellee, and it was urged that the decision should be discredited. It is not our province to denounce or overrule the adjudications of the highest Court of the State. The decision in that case was nevertheless subjected to severe animadversion by Presiding Justice Wilson at Jackson two years ago in a case much stronger for the injured servant than the one at bar, in that he was unskilled and inexperienced and labored under an assurance of safety upon the part of the master. The Supreme Court disagreed with this Court, and upheld the doctrine of the *Brown* case.

In the case at bar we are constrained to the view that Bettis not only impliedly assumed the risk of the tumbling

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in of the earth, but that he virtually expressly contracted so to do because of his repeated observations thereof and his directions to subordinates and his pronouncing of judgment with respect to the hazards from time to time and further, because of the placing in his hands or under his control of instrumentalities for obviating the risk. Under every known rule of law announced since the very early English case of *Priestly v. Fowler*, 19 Eng. Rul. Cas., 102, his representative must be denied a recovery.

Again, there was no breach of duty to warn or instruct. The dangers were just as apparent to Bettis as to Mitchell. Besides, the hazards were the ordinary risks of the employment. Warning or instruction has no place in such case unless it be that the servant is to the knowledge of the master ignorant of the risks. In such case the contract relieves the master of these ordinary hazards; and the servant is presumed to know of them. See 3 Labatt, Chapter on Assumed Risk, 1166, *et sequa*. Even extraordinary risks are assumed if the servant knew and appreciated them and continued in the employment.

Another rule is that the servant assumes the risks of all dangers which he can foresee and provide against or shun, especially when he is afforded the time, the instrumentalities and the opportunity to care for himself: *Cooper v. Railroad*, 24 W. Va., 37; 3 Labatt, 1245. In the instant case it is clearly shown that Bettis was expected to look out for changing conditions and was not required to be so deeply engrossed in his duties as to prevent him from looking about. It is also apparent that he had the right to call in Young or to direct his movements for the purpose of obviating any danger which to him might need attention. A superior servant thus placed and equipped cannot recover for injuries received, for the reason that it was his own neglect that brought about the injuries, and

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also because he under the circumstances must be held to have assumed the risk, and also because these considerations exclude the inference of culpable negligence upon the part of the master. 3 Labatt, Sec. 1260, and cases there cited.

3. We are of opinion that the added feature of assurance of safety relied upon by learned counsel for defendant in error is of no juristic value in this controversy. In other words, its presence or absence will not change the result. The knowledge of Bettis and Mitchell was equal. There was no added information or source of knowledge which Bettis could expect to acquire from Mitchell or any other superior. It is evident that a man of Bettis' knowledge and experience would place no reliance upon the judgment and skill of Mitchell or anyone else. Hence, there is no room for the assurance of safety feature as a ground of liability: *Railroad v. Edwards*, 111 Tenn., 31; *Locock v. Paper Co.*, 169 Mass., 313; *Hass v. Balch*, 56 Fed., 984; *Silvey v. Drill Co.*, 128 Tenn., 675. This doctrine has no application in any case where a servant understands the dangers just as well as the master: *Clothing Co. v. Pitts*, 123 L. R. A. (N. S.), 1114, and note on page 1116. No servant can ever be heard in Court to assert his reliance upon an assurance of safety when he knew and appreciated the dangers as well as the master did: *McKane v. Marr*, 79 Vt., 13; *Françoise v. Horton*, 26 R. I., 291. The assurance of safety factor never has any juristic importance where the servant is hurt by a danger which was an ordinary incident of the risk and which was likely to happen at any time. It has no place with respect to an ordinary, usual or to be expected risk or event, because the servant by entering into employment has agreed to relieve the master of the consequences. And with respect to extraordinary or unusual hazards with which the ser-

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vant is as familiar as the master, the assurance of safety cannot be regarded as the reliance or inducement to a continuance in the employment. Hence, it is not an element to be considered in determining the rights of the servant. No blame can attach to the master, such as that of having caused the servant to pursue a course upon the faith of statements or assurances: *Elgin v. Myers*, 226 Ill., 358.

We have pondered the authorities presented by very able counsel for appellee, but do not find therein anything which can be accepted as controlling.

It is unnecessary to discuss the other errors assigned. The judgment of the lower Court must be reversed and the cause dismissed, at the cost of the appellee.

ALMA H. RAHT, EXECUTRIX, v. P. M. WARREN ET AL.

Affirmed by the Supreme Court at Knoxville, 1914.

INSOLVENT ESTATES. *Lien of unregistered mortgage. Priority as against general creditors.*

The claims of the general creditors of an insolvent estate are superior to those of the holder of an unregistered mortgage executed and delivered by the mortgagor but not offered for registration by the mortgagee until after suggestion of insolvency and publication for creditors.

FROM KNOX COUNTY.

Appealed from the Chancery Court of Knox County.
WILL D. WRIGHT, Chancellor.

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GREEN, WEBB & TATE for Appellants.

CORNICK, FRANTZ, McCONNELL and SEYMOUR for Appellees.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THERE is being administered in the Chancery Court of Knox County, under the above style, the insolvent estate of J. D. Raht, deceased. One of the questions arising was as to whether a certain unregistered mortgage executed by Raht in his lifetime, but never registered, is entitled to priority over the general creditors of the estate. The Chancellor held that the mortgagee was entitled to priority. The executrix, acting solely as representative of the creditors and not pursuant to her own wishes, excepted to this decree, and has brought this question to us for decision.

The facts surrounding the execution of this mortgage are succinctly as follows: On the 11th day of March, 1912, J. D. Raht and wife executed to S. V. Carter a mortgage or deed of trust upon certain lands lying in Scott County, Tennessee, for the purpose of securing and indemnifying one J. J. Kelly against loss as surety on a \$10,000 note which Raht had that day made to the East Tennessee National Bank, and on which Kelly at his request had become surety. This note was executed for money borrowed at the time. The mortgage was duly acknowledged, and was immediately delivered to Kelly. Exactly what he did with it is not shown, other than that he took it to what he called the *office* and put it in the safe, meaning, as we shall interpret the statement, that Mr. Raht and he occupied the same office and used the same safe. The mortgage remained in this safe for approximately six weeks. Kelly states that it was his intention to register the instrument whenever he went to the county seat of Scott, but that he was delayed

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on account of absence from the city and business engagements in so doing.

Mr. Raht lost his life in a fire on April 28, 1911, some seven weeks after the execution of the mortgage. After his death Kelly and other parties searched the safe of Raht & Kelly for the trust deed, but failed to locate it. The supposition was, and is, that Mr. Raht took the instrument among other papers with him to his apartments a short while before the fire, and that the instrument was burnt up at the time. At all events, the document was never located. The preponderance of the evidence is that the mortgage was executed in good faith, and that it was the intention of the parties that the same should be registered. But as before stated it was never spread of record.

A very few days after the death of Raht his widow qualified as his executrix, and duly suggested and advertised the insolvency of the estate, and in a short while thereafter filed this bill for the purpose of removing the estate from the County Court to the Chancery Court for administration. Up to this time no step had been taken either by Kelly or the East Tennessee National Bank to fix or acquire any lien upon the property covered by the Scott County trust deed, and no effort made to set up the instrument as a lost document. Kelly and the bank were made defendants to Mrs. Raht's insolvent bill. In this bill the trust deed was set out, together with the circumstances of its execution, and the question as to its validity and priority was submitted to the Court for determination. It is conceded that the estate was and is hopelessly insolvent. It is also admitted that the bank acted in good faith and made the loan principally on the faith of the trust deed executed to Mr. Carter.

The bank, in answer to the bill, or rather by formal petition in which Kelly joined, set up its claim of priority

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under the trust deed. The decree of the Chancellor that this claim was entitled to priority raises the question presented to us for adjudication.

Owing to the diverse holdings of the Supreme Court of our State we have been somewhat at a loss to know or determine which course we should pursue. We find one case, that of *Henderson v. McGhee*, 6 Heiskell, 55, which unequivocally holds that an unregistered mortgage lien is not superior to the claims of general creditors, while there is another adjudication, that of *Kinsey v. McDearman*, 5 Coldwell, 392, which holds directly to the contrary. It is said by learned counsel that the case of *Gwynn v. Estes*, 14 Lea, 662, cites with approval the 5th Coldwell case, and that this latter case commits our State to the doctrine that the lien of an unregistered mortgage executed and delivered in the lifetime of the deceased debtor is superior to the claims of general creditors. We can reconcile or lay aside the latter case by recalling the fact that the mortgage referred to therein was registered before suggestion of insolvency or at least before the filing of the insolvency bill. The Court properly took the view that the instrument related upon registration to its execution, as no rights had intervened and no steps had been taken which actually or virtually fixed any equities in or impounded the property for other creditors.

A few remarks with reference to the 5th Coldwell case will suffice. The most important observation is that, for the time being, treating the 6th Heiskell case decided by Judge Turney as authority, the 5th Colwell case was undoubtedly overruled or overturned, although not mentioned. Another observation worthy of note is that the real basis of the mortgage given preference in the Coldwell case was for purchase money. Another remark is not amiss, namely,

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that the decision under examination was rendered before our insolvency proceedings had been thoroughly developed or analyzed as they have been in later cases.

It is quite singular that Judge Turney did not have in mind or direct his attention to the 5th Coldwell case in the preparation of his opinion in *Henderson v. McGhee*. It may appropriately be said also that it is quite singular that Judge Freeman did not have the opinion of Judge Turney in mind when he rendered the decision in *Gwynne v. Estes*. But these are oversights or omissions that will occur. It can well be said that the two cases just mentioned are not in conflict because of the distinction pointed out, namely, that the mortgage in the 14th Lea case was registered before suggestion of insolvency.

The question with which we are confronted now is as to whether the case of *Henderson v. McGhee* should be considered the prevailing authority. We may possibly arrive at a solution by ascertaining the accepted view of the proposition, or by finding out the attitude which the Courts, the digestors, annotators and the bar assume toward the question.

In Pritchard on Wills, Section 827, it is unequivocally stated that an unregistered mortgage is not entitled to priority over general creditors. It is the opinion of Mr. Shannon as indicated by his annotations of Section 4073 of his Code, that no superiority attaches to the lien of an unregistered mortgage, citing among others the case of *Henderson v. McGhee*. The compilers of the Ency. Digest, as we gather from page 727 of Volume 5, were of the same opinion; at least, they so digest the cases as holding this proposition. The editors of Cyc. classify Tennessee as among those States which hold that the creditor having an unregistered mortgage at the time of suggestion of insolvency cannot claim priority over general creditors.

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Taking up the *judicial* history of *Henderson v. McGhee*, we find that the Supreme Court, speaking through Judge McFarland, in *Langley v. Vaughn*, 10 Heiskell, 553, stated that the Court had held in several cases that the mortgagee of an unregistered mortgage was not entitled to priority. In *Watson v. Watson*, 1 Baxter, 387, the undoubted holding of the Court was that a mortgagee who delays registration until after suggestion of insolvency loses his right to a preference. These adjudications were almost cotemporaneous with the decision in *Henderson v. McGhee*, and are persuasive evidences of the rule of law then understood and accepted. The case of *Henderson v. McGhee* was referred to by name by Judge Cooper in the case of *McGuffey v. Johnson*, 9 Lea, 559, and again by the Court in the case of *Bacchus v. Peters*, 85 Tenn., 678. As late as *Richardson v. Vick*, 125 Tenn., 545, Judge Shields took cognizance of the fact that there were numerous decisions to the effect that the lien of an unregistered mortgage was not superior to the claims of general creditors. We likewise examined Grayson's Annotations and Commentaries on the Laws of Tennessee, and found that that author was of opinion that such a mortgage was not entitled to priority. Vol. 2, p. 533.

We cannot believe that these numerous references and utterances would have found place and space in the decisions and law books of Tennessee if the 5th Coldwell case had not been thoroughly discredited or ignored. No other explanation can be given. We are confident that the general and prevailing opinion has been that the case of *Henderson v. McGhee* was the sounder and better rule.

It is not worth while to cite authorities to sustain the proposition that a mortgage is simply one means of creating a lien; and, further, that the suggestion of insolvency would not destroy liens acquired and fixed in the lifetime

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of the decedent. These propositions of course cannot be controverted. But it is equally as well settled that upon suggestion of insolvency and advertisement thereof, or at least upon the filing of a bill to administer an estate as insolvent, every creditor as it were becomes a party to the cause and acquires an equitable right to participation in all the funds, both real and personal, to which other creditors had not fixed specific and recognized liens. In other words, the creditors of the decedent become judgment creditors suing through the personal representative, who by the filing of a bill and the enjoining of other suits impounds all the property and holds it for final and equitable distribution without regard to secret or unknown claims or arrangements. *Bates v. Elrod*, 13 Lea, 159; *Martin v. Blankenship*, 5 Heiskell, 156; *Bank v. Susong*, 6 Pickle, 590; *Ewing v. Ewing*, 3 Lea, 381; *Watson v. Watson*, *supra*. These general creditors take the estate disencumbered of any liens not known and recorded. They have the right to assume that every mortgage creditor whose instrument is not registered elects to take with the other creditors; at least, they are justified in the assumption that the property which they or the personal representative brings into Court is there for ratable distribution.

Our conclusion is that the learned Chancellor was in error in allowing Kelly and the East Tennessee National Bank a preference. The case is not free from difficulty, but we are of opinion that the conclusion at which we have arrived is the better and the safer one, and more in accordance with our insolvency and registration laws. We are not dealing with the case of delay in registration for a reasonable time, nor with the case of a satisfactory explanation of the delay. These phases of the matter might or might not change the result. In the case at bar the reason for delay in registering so important an instrument is neither reasonable nor plausible nor satisfactory.

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We were very much impressed with the able argument of counsel to the effect that no subsequent creditors are shown, and that there is no evidence of anyone having been misled by the failure to register. Notwithstanding these considerations, we are persuaded that former creditors had the right at all times to be informed of any changes in the real estate holdings of their debtor, and that it would be a dangerous rule to allow a mortgagee to intervene after suggestion of insolvency and appropriate a fund to which the general creditors thought they were entitled.

The decree of the Chancellor will be reversed and the cause will be remanded for further proceedings not inconsistent with this opinion. Appellee will pay the costs of this Court.

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MEMPHIS STEAM LAUNDRY V. ELIZA JOHNSON AND
HUSBAND

AND

MEMPHIS STEAM LAUNDRY V. ALBERT JOHNSON.

Writ of certiorari denied by the Supreme Court, 1915.

1. CHARGE OF COURT. *Master and servant. Res ipsa loquitur.*

It is not reversible error for the Circuit Judge to refuse to state to the jury that in a case of an injured servant against his master no presumption of negligence arises merely from the happening of the accident where the occurrence itself suggests possible negligence.

2. SAME. *Master and servant. Request refused.*

It is not error for the trial Court to decline a requested instruction that where there are several possible causes of an accident the plaintiff must show by a preponderance one cause and the jury must find that the master was responsible therefor, where the evidence leaves no room for doubt as to the proximate physical cause of the occurrence.

3. SAME. *Negligence of fellow servant combined with negligence of master as to place and machinery.*

The rule exempting a master from liability for the personal negligence of a foreman has no application where the negligence of this foreman, although the immediate cause of the death of a servant, combined with the preceding negligence of the master with respect to place of work and machinery, produced the injury.

4. FOREMAN. *Personal negligence of. Failure of court to distinguish. Harmless when.*

Although it is true that the master is not liable for the personal negligence of his foreman or superintendent as contradistinguished from his official negligence, it is not reversible error for the Court to state broadly that the master is responsible for all acts of the foreman, if as a matter of fact,

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the accident was caused by the personal act of the foreman in conjunction with the negligence of the master with respect to place or machinery.

5. MASTER AND SERVANT. *Change of place. Increase of hazards.*

A master who changes his place of work or makes material alterations in his appliances without fully informing his servants thereof or affording them an opportunity to become aware of the increased risks is guilty of negligence.

6. SAME. *Husband and wife. Damages.*

The master is responsible to the husband for medical bills and loss of service occasioned by negligent injuries inflicted upon the wife, although the master did not know that the injured one was a married woman.

FROM SHELBY COUNTY.

Appeal in error from the Third Division of the Shelby Circuit Court. A. B. PITTMAN, Judge.

WILSON & ARMSTRONG for Plaintiff in Error.

T. F. KELLEY for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THESE two causes were heard in the lower Court together and likewise in this Court. They were actions by Johnson and his wife to recover in the first case damages for personal injuries sustained by Eliza Johnson while in the service of the plaintiff in error. The second suit is that of the husband to recover for medical bills and loss of service by his wife, consequent upon the injury. The verdict in the former was for \$600.00, in

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the latter for \$200.00. The Circuit Judge overruled motions for a new trial and pronounced judgment. The laundry company has appealed and assigned errors.

The insistence of plaintiff in error under the first and second assignments of error is in substance that there is no evidence to support the verdict, that the Court should have given in charge to the jury as an absolute rule of law the instruction that there did not arise any presumption of negligence in the case, and as nothing else was shown than the happening of the accident, the verdict should have been for the laundry company.

We have determined that it will be wholly unnecessary to enter upon a disquisition as to the application on non-application of the doctrine or *res ipsa loquitur*, for the reason that we are persuaded that the right of the plaintiffs below to go to the jury was reasonably clear, whatever view may be taken of the rule.

We shall content ourselves with the statement that the trial Judge did not commit reversible error in failing or refusing to state in *haec verba* to the jury that there was no presumption of negligence. It should be kept in mind that this formula is a mere rule of evidence fashioned for simplicity and convenience, and that it must be kept from the *arterio-sclerosis* stage. It must be negatively applied with caution even in the cases of master and servant. To do so indiscriminately would be to repel many injured servants from the forum without remedy. It must never be used as an excluding rule where there are any circumstances surrounding the accident which might indicate or which point to the negligent failure of the master to perform all the duties which he owes the servant.

In the case at bar there are incidents and surroundings which might furnish the basis of an inference that the

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master did not observe due regard for the safety of his servants. In addition to those circumstances, we have positive testimony tending to show that the machinery installed was defective and insufficient for its purposes and that it was dangerous, and so known to the vice-principal of plaintiff in error. These facts would render a specific instruction that no presumption of negligence can be indulged against the master inappropriate.

It is insisted in the third and fourth assignments of error that the Court improperly stated to the jury that the laundry company was responsible for the negligence of the foreman, and that the Court was further in error in declining to give in charge a special request that if the jury believed that the foreman was guilty of personal negligence only there could be no recovery. These criticisms would under ordinary circumstances be very cogent, but we have reached the conclusion after a careful analysis of the testimony that no reversible error was committed in this respect.

It was specifically averred that the master had changed the working place and appliances and increased the hazard without informing the servant thereof. It is also deducible from the averments that the master had negligently exposed his servants to unnecessary hazards. Everyone of these averments is sustained by the clear preponderance of the evidence. That the master is liable under the circumstances indicated cannot be controverted. 26 Cyc., 1169. There is no effort to show that this woman assumed the risk. She certainly was not guilty of contributory negligence. Her knowledge of the dangers was not such as to charge her with the assumption of the hazards. Hence, her right of recovery is, in our judgment, clear, and a new trial would not bring about a different result.

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Let it be conceded that the gasoline boiler exploded because of the negligent personal act of the foreman. It is reasonably certain that this would not have happened if the machinery had been properly installed or properly constructed. Hence, the insistence that there could be no recovery for the personal negligence of the foreman falls to the ground. It is axiomatic that a master is liable for an injury sustained when the negligence of a fellow servant combined with his own produces the harm. Again, we are persuaded that the master breached his highest duty when he installed a dangerous instrumentality, a something which undoubtedly rendered the working place of the servants in the laundry rooms more hazardous, without informing the servants thereof and affording them an opportunity to elect to remain or retire from their jobs. We are also of the opinion that the master was guilty of negligence in unnecessarily exposing his underlings to the dangers of an explosion.

It is said that the Court was in error in failing to give in charge a special request to the effect that where there are several causes of an explosion or an accident, for some of which the master would be liable and for some of which he would not be responsible, the jury should find that the cause of the accident was something for which the master was responsible. Ordinarily this is a sound instruction, pertinent to cases founded on circumstantial evidence. But we are of the opinion that no prejudicial error was committed, for the reason that the proximate cause in the physical sense was the gasoline boiler in connection with the handling of it by the foreman. If this act of the foreman was superinduced by the preceding negligence of the master in changing the method of doing work, and especially by installing a more dangerous equipment (and such we find to be the fact), then, there

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was but one proximate or efficient cause of the accident. Hence, there was no error in failing to submit this feature to the jury. It must be understood that we think it demonstrated that the master had been guilty of negligence before the intervening negligent act of the foreman.

It is insisted in assignment number six that the Court was in error in submitting to the jury the degree of care to be exercised by the master with respect to the gasoline tank. It is said that in the instruction criticized the Court assumed that the gasoline tank installed to operate the iron was a dangerous thing, and that the Court indirectly placed upon the master more than ordinary care. We do not so construe the charge. It is a simple statement that the degree of care, at all times ordinary, owing by the master, varies with the circumstances. In the next place, the Court simply stated the theory of the plaintiff to be that the thing was dangerous, and that it required the most diligent watchfulness in order to be ordinarily careful. There was no harm done in stating to the jury that if the thing was dangerous it was for them to determine whether *ordinary care* required the master to be constantly diligent and watchful.

In the seventh assignment, the verdicts of the jury in the two cases are assailed. We do not think the verdict so excessive as to indicate passion, prejudice or caprice. There is an intimation that the plaintiff in error was not aware that Eliza was married. It was suggested in consultation that the allowing of the husband to recover was charging up to plaintiff in error consequences which were not foreseen. This suggestion is plausible, but we do not think that it would be an answer to the demand of the husband. At least, no prejudice resulted. If the master was liable to Eliza, it could be held responsible to her or to her husband for her medical bills and loss of time.

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The eighth assignment of error is too general. We are of opinion that upon the whole record no reversible error was committed, or at least that a new trial would avail plaintiff in error nothing. The judgments are affirmed with costs.

E. B. LLOYD AND WIFE V. J. H. GILL.

EXECUTOR. *Liability as such for maintenance of widow.*

An executor cannot be held liable as such for support and maintenance of the widow furnished by a third person where no trust or such duty to care for the widow was by the testator imposed or charged upon his estate.

FROM BEDFORD COUNTY.

Appeal in error from Circuit Court of Bedford County.
JOHN E. RICHARDSON, Judge.

W. H. CROWELL for Plaintiff in Error.

CALDWELL & GREER for Defendant in Error.

Presiding JUSTICE WILSON delivered the opinion of the Court.

THIS is a suit by plaintiffs in error to recover from defendant in error, as executor of the will of W. J. Lloyd, for services alleged to have been rendered by them to Rhoda Lloyd, the widow of W. J. Lloyd, for the years 1911, 1912, and 1913. The suit was brought before a

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Justice of the Peace November 22, 1913. The Justice December 13, 93, rendered judgment in favor of plaintiffs in error for \$490.00 and the cost. The executor, defendant in error, appealed to the Circuit Court. The case was tried in that Court before a jury April 9, 914. The Court instructed the jury to return a verdict in favor of the executor, which was done and the case dismissed. A motion for a new trial was made and overruled, and plaintiffs in error appealed in error to this Court.

They assign as error the action of the Court directing the verdict of the jury.

W. J. Lloyd died testate more than seven years ago. He left this will:

"This March 5 1907. will of W. J. Lloyd we, being of sound mind and disposing memory do make and publish this our last will and testament. desire that all of our personal property and real estate remain in our possession as long as we both do live, after our death I want all my personal property and real estate sold, I desire that it be equal devied between all of my children with the exception of W. J. Lloyd, Junior a note of \$50.00 I hold against him to be taken out of his share and with the exception of Alfred Willoughby children a note I hold against him for \$20.00 without interest to come out of his children share and the exception of J. A. Claxton a note I hold against him for \$50.00 to come out of his wife Susan share and with the exception of Nancy Ann Lynch I desire to give her fifteen dollars more than the rest of the airs, I appoint J. H. Gill to be my executor.

"WILLIAM H. LLOYD."

This will was witnessed by two witnesses, and was probated September 17, 1907.

When the case was called in the Circuit Court, both parties announced ready for trial.

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Plaintiffs in error claimed an express contract with Mrs. Rhoda Lloyd, deceased, by which they were to be paid for their services. Both parties agreed that such was their claim.

The executor denied liability of the estate of W. J. Lloyd under the provision of said Lloyd's will, and counsel stated that if the Court would determine this legal question, first, that is, as to whether or not the estate could be made liable, under the terms and provisions of the will, it would expedite matters and save much time and expense.

The attorneys of plaintiffs in error insisted that the estate was liable by virtue of the terms of the will above copied, and that the services were rendered under a contract with Mrs. Lloyd to be paid therefor.

Counsel of plaintiffs in error stated that they had their witnesses present and offered to prove their contention, and said services were rendered to the widow, and by express contract with her they were to be paid therefor, and they also had witnesses to prove the value of the services. The will above copied was read and considered by the Court.

E. B. Lloyd was introduced as a witness, and it was offered to be proved by him, that he and his wife rendered services, after the death of W. J. Lloyd, to his widow, Mrs. Rhoda Lloyd, and the value of the same.

This evidence was objected to, and upon construction of the will by the Court, this evidence was ruled out, to which exception was taken.

In other words, the Court held under the will aforesaid, that the estate of W. J. Lloyd was not liable.

The amount and character of the estate of W. J. Lloyd, deceased, is not proven. The exact date of the death of Mrs. Rhoda Lloyd is not proven.

While this will is rather a singular one, it is apparent, when it is taken in its entirety, that it is the will of W. J.

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Lloyd, and it disposes of all his property to take effect after the death of his wife.

Just exactly when William J. Lloyd died is not shown, further than it is stated in the record that he died more than seven years ago.

We are of opinion that the trial Judge was correct in his ruling, that, under the will, this claim for services rendered to Mrs. Rhoda Lloyd, after the death of her husband, could not be charged against his estate.

The judgment of the Court below will be affirmed with cost.

SARAH A. LILLIENKAMP v. J. T. RIPPETOE.

Affirmed by Supreme Court, at Knoxville, 1915.

MARRIED WOMEN. *Right to sue husband for assault and battery committed while living together. Acts 1913, chapter 28.*

A wife has no right of action for damages against her husband for an assault and battery committed upon her by him while they are co-habiting as husband and wife, although they subsequently separate. She had no such right at common law, and her rights were not so enlarged by chapter 28, Acts 1913, as to vest her with this right to sue.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
V. A. HUFFAKER, Judge.

Lillenkamp v. Rippetoe.

E. B. TAYLOR for Plaintiff in Error.

W. N. HICKEY for Defendant in Error.

Presiding JUSTICE WILSON delivered the opinion of the Court.

PLAINTIFF IN ERROR sued her former husband to recover damages on account of an assault and battery he made upon her while they were living together as man and wife. A demurrer was sustained to the declaration and she appeals in error to this Court.

She assigns the following errors:

1. The Court erred in sustaining the demurrer of defendant in error upon the ground that it was sustained, that is, upon the ground that plaintiff and defendant were husband and wife at the time the assault and battery was committed and in dismissing plaintiff's suit.

2. The Court erred in not granting plaintiff in error a new trial on the grounds set down by her—to wit, that the Court was in error as just above set out in the first assignment of error and in dismissing her suit.

It is seen that these two assignment of error raise the same question.

We observe that defendant in error interposed a demurrer containing two grounds. We need not allude to one of the grounds, as it was overruled. The ground of the demurrer sustained was that no cause of action was stated in the averment of the fact that defendant in error assaulted her while they were man and wife.

It is earnestly insisted by able counsel of plaintiff in error that under our statute, Section 6470 of Shannon's Code, which makes it a misdemeanor whenever a husband commits an assault and battery upon his wife for any

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cause whatever taken in connection with the Act of 1913, Chapter 26. The first section of the Act of 1913 is as follows:

"Be it enacted by the General Assembly of the State of Tennessee, That married women be and are hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effect on the rights of property of the wife is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property, which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property, real and personal in possession, and to make any contract in reference to it and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married."

It is conceded that under the common law a married woman could not sue her husband for an assault by him upon her, nor could he sue her for an assault by her upon him. The idea underlying this rule of the common law was the unity of the married couple.

On an analysis of the Act of 1913, Chapter 26, it appears to us, it was not intended by the Legislature to destroy this essential element of the marriage contract as defined by the common law. Its intent was to absolutely emancipate her with respect to her rights of control over and disposition of property and its acquisition. A pertinent case bearing upon this question is *Thompson v. Thompson*, 218 N. S., 611, reported in 30 L. R. A. (N. S.), 1153, 1156.

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This case was a suit by the wife in the District Court of Columbia to recover damages from her husband for an assault and battery upon her by him. There was a demurrer to the declaration interposed by the husband as in the case at bar, and it was sustained.

The case finally reached the Supreme Court of the United States at the instance of the wife to review and reverse the judgment of the lower Court sustaining the demurrer of the husband. The Supreme Court of the United States sustained the action of the lower Court sustaining the demurrer. This action by the wife in the District of Columbia was predicated upon an enabling Act of Congress. Said Act was as follows:

“Married women shall have power to engage in any business and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property, *and for torts committed against them*, as freely as if they were unmarried. Contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage as freely as if they were unmarried, and upon judgments recovered against them, execution may be issued as if they were unmarried. Nor shall any husband be liable upon any contract made by his wife in her own name and upon her responsibility, nor for any tort committed separately by her out of his presence without his participation or sanction; provided, that no married woman shall have power to make any contract, as surety or guarantor or as accommodation, drawor, acceptor, or endorser.”

Justice Day, speaking for the majority of the Supreme Court of the United States, said:

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"At the common law, the husband and wife were regarded as one—the legal existence of the wife during coverture being merged in that of her husband, and, generally speaking, the wife was incapable of making contracts, or acquiring property or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other."

The learned justice then refers to the more liberal policy in favor of wives arising under any modern statutes, and says:

"It is unnecessary to review these statutes in detail. Their obvious purpose is in some respects to treat the wife as a *feme sole*, and to a large extent to alter the common law theory of the unity of husband and wife. But this refers to the different terms of different statutes enacted for the purpose stated." He said: "Apart from the consideration that the perpetration of said wrongs affords adequate grounds for relief under the statutes of Divorce and Alimony, this construction (referring to suit by one spouse against the other), would at the same time open the doors of the Courts to accusations of all sorts of one spouse against the other and bring into public notice complaints for assault, slander, and libel, and alleged injuries to property, for the one or the other by husband against wife or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question.

"The possible evils of said legislation might well make the law making power hesitate to enact it."

He said further:

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"It must be presumed that the Legislators who enacted the statute were familiar with the long-established policy of the common law and were not unmindful of the radical changes in the policy of the centuries, which such legislation, as is here suggested, would bring about. Conceding it to be within the power of the Legislature to make this alteration in the law, if it saw fit to do so, nevertheless, such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose, not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also, for injuries to persons or property as though they were strangers, thus emphasizing and publishing differences which otherwise might be serious, it would have been easy to have expressed that intent in terms of irresistible clearness."

"We can but regard this case as another of many attempts which have failed to obtain by construction radical and far-reaching, changes in the policy of the common law not declared in the terms of the Legislature under consideration."

A Mrs. Strom obtained a divorce from her husband in Minnesota and thereafter sued her husband to recover damages for an assault committed upon her by her husband while they were married. The defendant interposed two pleas:

1. A denial of the assault; and,
2. That at the time of the assault they were husband and wife, and that she had been awarded a divorce and procured alimony, and because of the marriage relation she could not recover damages, and also because of the fact that the decree awarding alimony was *res adjudicata*.

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Mrs. Strom demurred and her demurrer was overruled in the lower Court and she appealed to the Supreme Court of Minnesota.

The contention of her counsel was, as in the present case, that the Married Woman's Act of Minnesota gave her the right.

This Act of Minnesota, so far as need be stated, is as follows: "That from and after the passage of this Act, women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man, and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the Courts of law or equity for redress and protection, that her husband has to appear in his name alone; provided, that this Act shall not confer upon the wife a right to vote or hold office, except as is otherwise provided by law."

The Supreme Court held in the case that a woman, even after divorce, cannot maintain an action against her former husband for an assault committed upon her during coverture under a statute preserving the legal personality of a woman after marriage, and giving her the same right of action for injuries sustained to her person in her own name that her husband has for injuries to him.

This case will be found reported in 6 L. R. A. (N. S.), 191, 192. The case is largely annotated, and in the notes there will be found the decisions of Courts of last resort in quite a number of States. The learned Chief Justice, in delivering the opinion of the Supreme Court of Minnesota, after quoting the statute above set out, said: "The purpose of the statute was to place the husband and wife on an equality as to actions by either for injuries to per-

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son, reputation, or property. He cannot, and never could, bring an action against his wife for a personal tort committed by her against him during coverture. It follows, that the statute does not authorize her to bring an action against him for a personal tort committed by him against her during coverture, for her rights in this respect are expressly limited by the statutes by the rights which the law gives to him."

Now, we may remark that the Act of 1913, relied upon by able counsel for appellant, does not give the husband any right to sue the wife for a tort, or an assault committed by her upon him, and this Act gives her the right to sue him for an assault upon her, she is given a privilege that is not possessed by the husband.

Similar holdings have been announced by the Supreme Courts of New York, Pennsylvania, Maine, Michigan, Illinois, and California.

The fundamental fact is, that the Act of 1913 passed by our General Assembly does not, either in words or spirit, contemplate the abrogation of the unity involved in the marriage relation between husband and wife as recognized by the common law.

If correct in this view, it follows that there was no error in the judgment of the Court below sustaining the demurrer of defendant in error, and its judgment will be affirmed with cost.

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HATTIE BOYCE V. SOUTHERN RAILWAY COMPANY.

Affirmed by Supreme Court at Nashville, 1914.

STATUTE OF LIMITATIONS. *New suit after dismissal of second suit.*

Plaintiff in a personal injury case who has taken a non-suit in his first action, must institute his next or any subsequent suit within one year of dismissal of the first action. Any suit brought more than one year after the dismissal of the first action is barred, notwithstanding it may be within one year from the last non-suit of a series of suits.

FROM DAVIDSON COUNTY.

Appealed in error from the Second Circuit Court of Davidson County. H. M. MEEKS, Judge.

W. A. HENDERSON and ALBERT AKERS for Railway Company.

GARLAND MOORE and W. H. WASHINGTON for Mrs. Boyce.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS suit was brought to recover a judgment for the alleged negligent killing of plaintiff's husband. After the declaration was filed in the case, the defendant demurred to it, stating as a ground thereof that the cause of action accrued, as appears from the face of the declaration, more than one year before the suit was instituted, and for that reason the suit was barred by the statute of limitations.

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The plaintiff asked and obtained permission to file an amendment showing that she had begun a suit in the Circuit Court of Putnam County against the defendant, the Railroad Company, on December 1, 1906, for the negligent killing of her husband; that, on the 24th of March, 1908, she took a voluntary non-suit, and that on March 30, 1908, she instituted another suit in the Circuit Court of Davidson County for the same cause of action against the same defendant, which suit was dismissed on motion of the defendant on April 3, 1909, because of her failure to file a declaration. She then brought the present suit against the defendant railroad company and another, on the 31st of July, 1909, for the same cause of action, and filed her declaration in due time.

The ground upon which the demurrer was sustained was, that her last suit was not brought within one year from the time she took her non-suit in the first case, on the 24th of March, 1908. It is insisted by her learned counsel that she promptly brought the second suit six days after she took her non-suit, and that she had a right to bring the third suit after the second one was dismissed, provided she brought the third suit within one year after her second suit was dismissed. Defendant's learned counsel, however, insists that she could only bring one suit after she took a non-suit in her first action, and that the second suit must be instituted within one year after her non-suit was taken, and that she has no right to bring successive suits against it, although each suit is brought within a year from the time the preceding suit was dismissed.

Section 4446 of Shannon's Code is as follows:

"If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the

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plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest," and in order to determine the rights of the parties, and settle the question presented in this record, it becomes necessary to construe this section of the Code.

Learned counsel for appellant insists that so long as plaintiff dismisses her suit and pays the cost of the same, she may, from time to time, bring any number of suits against the defendants, provided each suit is brought within one year after the suit preceding it is dismissed. It is insisted, and we think rightfully so, that after she took her non-suit, on the 24th of March, 1908, she then had a right to bring another suit, as she did on the 30th of March, 1908, inasmuch as her non-suit was not a decision of the case upon its merits. Up to this point there is no disagreement about the law between learned counsel for plaintiff and defendant, and it is conceded that plaintiff had the legal right to begin her second suit on the 30th of March, 1908, after she took a non-suit on the 24th of that month and year. The second suit remained on the docket a little more than one year, when, the plaintiff failing to file a declaration, it was, on motion of defendant, dismissed; and its learned counsel insists that she then had no other or further right to begin another suit for the same cause of action, and when she instituted the third action, on the 31st of July, 1909, more than three years after her husband was killed, her cause of action was then barred by the statute of limitations of one year.

Her suit was not tired on its merits, either when she took her non-suit nor when it was dismissed on motion of defendant. The judgment against her, in both instances, was not upon any ground that concluded her right of ac-

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tion. There never was, in either case, a trial of the cause upon its merits, but simply in the one instance, a voluntary non-suit taken by herself, and in the other, a dismissal of her action on motion of the defendant, because of her failure to file a declaration.

The same question was before this Court at its May term, 1911, at Knoxville, in the case of *A. Mincher v. Look-out Boiler & Tank Co.*, and it held, in an opinion delivered by Mr. Justice Wilson in that case, that "the statute means obviously, as we think, that, where a suit is brought within the time prescribed by the statute, it may be dismissed and another suit brought within a year thereafter, or half a dozen suits may be brought within the year after the dismissal of the first suit, all preceding ones being dismissed, but all subsequent suits must be brought within a year after the dismissal of the first suit." We think now, as this Court thought then, that the foregoing is a correct construction of the section of the Code we have quoted, *supra*. When the first suit was dismissed, plaintiff may bring and dismiss as many suits as she thinks proper within one year after the first suit is dismissed, provided, as we now think, she was without fault in dismissing her different suits. But, in no case, do we think the statute was intended to give her the right to bring a suit after the expiration of one year from the dismissal of the suit first instituted. We think the plain meaning of this statute is, that when an action is instituted and the plaintiff voluntarily dismisses it, or takes a non-suit, such plaintiff may then, within one year after such dismissal or non-suit, institute a new suit for the same cause of action, but when that is done, the right, under this statute, has been exhausted. If her suit is dismissed because of her failure to file a declaration, or on account of any default of hers, then, under *Anderson & Wife v. Bedford*, 4 Cold., 465, it is doubtful

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if a plaintiff can institute a new suit within a year after her first action is dismissed because of her own default. It is not necessary, however, that we decide that question, though such seems to be the holding of the Supreme Court in the cited just cited, *supra*.

In *Railroad Company v. Pillow*, 9 Heisk., 262, the Supreme Court said: "The new action in such case, *must* be brought within one year after the termination of the action, which was commenced within the time limited by law for the bringing of such action," so that the indefinite succession of such suits upon the same cause of action cannot result from the construction given to the act as suggested by counsel.

We think the Supreme Court means, in the excerpt quoted above, to give to this statute the same construction that this Court has heretofore given it, and which we now place upon it. The Court said the new action *must* be brought within one year after the termination of the first action, but counsel for appellant contends that the new action may be brought after the expiration of the one year from the dismissal of the last suit. The reason why the Supreme Court says the new action must thus be brought, is to avoid an indefinite succession of suits upon the same cause of action; but learned counsel argue that a proper construction of the statute gives them a right to institute an indefinite succession of suits upon the same cause of action.

Counsel cites the case of *Christian v. John*, 111 Tenn., 92, in support of his insistence; but upon an examination of that case, we find the question was not passed upon, and that the case has no application of the facts of this case.

The case in 5 Cold., 939, cited by learned counsel, was where the suit was brought within one year after the dismissal of the first one, and it was held that that was per-

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missible under the statute, for the reason that the first suit was dismissed because the papers in the case had been lost. We think this case was correctly decided upon its facts, and that it correctly construed the statute cited, *supra*.

The case of *Nash v. Davis*, 3 Higgins, 634, is cited by learned counsel for appellant in support of his insistence; but this question was not before the Court in that case. The recital of the facts show that the suits were brought before the statute of three years was a bar to any of them, and the suit being for injury to personal property, the three years' statute applied; hence, it has no application to the case at bar.

We find upon an investigation, that other States have statutes similar to the one in force in this State, and that in construing them the Supreme Court of such States have reached the same conclusion we have in this suit. 42 Kansas, 264. The case cited by learned counsel from Missouri, 188 Mo., 647, does not support his insistence for the reason that it appears from the opinion delivered in that case, that two of the suits involved were begun and dismissed within the period of the statute of limitations, and that the third and last one was instituted within one year from the dismissal of the second suit; and if the two first suits instituted in this case had been brought and dismissed before the statute of one year expired, the third suit could have been brought within one year after the second suit had been dismissed, it having been dismissed within the one year limitation. But we have no such case as that before us, the second suit having been dismissed more than two years after the cause of action arose, and at a time when suit was barred by the statute of one year.

For the reasons stated, we are of the opinion that there was no error in the action of the trial Judge in dismissing plaintiff's last suit, and his judgment is affirmed with costs.

Rice v. Crump.

J. O. & J. A. RICE v. J. S. CRUMP.

Affirmed by the Supreme Court at Knoxville, 1914.

1. MORTGAGOR AND MORTGAGEE. *Relinquishment or sale of the equity of redemption.*

A mortgagee may take from his mortgagor an assignment or relinquishment of the latter's equity of redemption reserved under a mortgage of real estate, provided the transaction be fairly conducted and free from fraud or imposition and free from any advantage taken or oppression exerted because of the poverty of the mortgagor. But such transaction will be closely scrutinized.

2. OPTION GIVEN A LESSEE TO PURCHASE. *Destruction of property before acceptance. Right to insurance money.*

The giving of an option is a mere offer to sell which may be withdrawn at any time before acceptance if without consideration, or withdrawn at expiration even if founded on a consideration. The optionee has no interest in the land, and is not entitled to the insurance money collected for the destruction of buildings before notifying the optionor of acceptance.

3. SAME. *Specific performance. Abatement of price.*

The rule under which the contractee in a contract of sale of land may compel specific performance *pro tanto* in case of destruction of or loss of part of the property has no application to the relation of optionor and optionee. In such case the optionor is not compellable to convey and take as credit the amount of an insurance policy upon the property which he has collected in the interim.

FROM HAMBLÉN COUNTY.

Appealed from the Chancery Court of Hamblen County.
G. KYLE, Chancellor.

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W. N. HICKEY for Complainants.

J. A. CARRIGER and ERNEST B. TAYLOR for Defendant.

COMPLAINANTS, averring that they were the owners in fee of certain realty in the city of Morristown known as the Virginia House, filed this bill against the defendant for the purpose of restraining him from asserting any title to or right in the property and seeking to have whatever claim or interest Crump was contending for with respect to this property removed as a cloud.

Defendant filed an extended answer and cross-bill in which he asserted that complainants were not the absolute owners of the property described, but held it as mortgagees or trustees; that several transactions, contracts and conveyances referred to as having taken place between J. O. Rice and the defendant were mortgages, and that the defendant had tendered to the latter all sums to which he was entitled, and that the defendant became thereby re-vested with title or vested with the right to redeem; that at all events, under a certain conveyance or contract of February 11, 1911, defendant had the right or option to buy or repurchase the property within sixty days from a specified event; that he had declared his intention of exercising that right, and had tendered the actual amount due, less a credit of insurance money which had been collected by complainants for the use and benefit of the defendant; and that this was sufficient to vest defendant with the right to call upon complainants for specific performance; defendant also asserted that the insurance was carried for his benefit, and also that there was an agreement upon the part of complainant J. O. Rice to keep the property insured, and that he had breached this agreement; and recovery of damages was sought because of negligence of complainants in their

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manner of caring for the property after a destructive fire of June 12, 1911. Many other acts, circumstances and supposed grounds of liability, including numerous charges of fraud, deceit, imposition and breach of good faith, were set out in the cross-bill. But it is unnecessary for us to be more specific. A brief statement that the answer to the cross-bill disputed the material averments thereof will suffice.

Upon the hearing the Chancellor dismissed the cross-bill and sustained the original bill and removed as clouds any and all claims which had been asserted by defendant. From this decree he prayed and perfected his appeal, and is here assigning numerous errors.

Learned counsel representing him have filed a brief evincing great learning, skill and ingenuity—a brief that is calculated to give a Court pause. The record in this case is also immense, and the splendid brief filed by able counsel representing the appellees is of no small size. We have therefore been treated to an immense amount of reading matter, and there was entailed upon us a difficult situation with which to deal. Nevertheless, we have carefully read the briefs and have painstakingly gone through this large record, re-reading a large part of it. Notwithstanding the numerous questions raised, and notwithstanding the vast volume of evidence and the numerous authorities presented, our critical examination and analysis of the case have enabled us to present within a reasonably small compass all the questions which we shall have to consider.

It will not be necessary to take up the numerous assignments of error and treat them separately. Our conclusion is that three questions only need be discussed with any elaboration. Those questions are, namely, whether the relation of mortgagor and mortgagee existed between J. O. Rice and the defendant Crump during the many years and

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at different times when the instruments presented for examination were executed; whether certain insurance money collected by the Rice's in 1911, belonged equitably to the defendant; and whether or not the defendant, when he undertook to tender a large sum of money to J. O. Rice *had the right at that time* to avail himself of an option to purchase.

No great length of time need be consumed in the discussion of the rules of law bearing upon the points at issue. Our first duty must be to ascertain the situation and the undoubted intentions of the parties. No great difficulty will arise when an attempt is made to apply the rules of law to these facts. That equity will look beneath all forms and ascertain the essence of agreements, and that it will give effect to the real intention of the parties, even in the teeth of their verbal stipulations, cannot be denied. That the equitable rule of treating an instrument once a mortgage as always a mortgage is sound and of frequent application is not to be gainsaid. That instruments will be construed as mortgages in preference to sales with liberty to re-purchase, or as conditional sales is, likewise incontrovertible. That all dealings between mortgagor and mortgagee will be closely scrutinized, and that the presumption of unfair dealing between the two may easily arise, and that the mortgagee will not be permitted to take even the slightest advantage of the situation and the necessities of the mortgagor must be accepted as propositions of unquestioned soundness.

But that the mortgagee may purchase the mortgagor's equity of redemption and may terminate relations between themselves is equally true. It is likewise true that a Court of conscience never undertakes to make a contract for parties deliberately entered into in the absence of imposition or fraud.

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We have reached the conclusion, after a close analysis of the instruments executed between or among the parties upon the 17th day of June, 1901, and preceding dates, that the document executed on the day named was intended by the parties to be, and that it was, in fact, a settlement of the question as to whether the preceding transaction was in essence a mortgage or a deed. In other words, we are of opinion that J. O. Rice, by this instrument, became vested with the legal title to the property, with certain rights or equities and liberties to re-purchase which gave Crump and his mother substantial rights and yet did not prevent the instrument of June 17, 1901, from operating as a deed.

In the early part of 1901 a controversy between Crump and J. O. Rice arose as to the nature of the instrument of January, 1900. The feeling generated thereby became bitter. It was contended by Rice that he was the owner of the property and not a mere mortgagee. It was asserted, on the other hand, by Crump that Rice held the property as mortgagee.. It was then that any relations of trust and confidence subsisting between the parties were strained to the breaking point and they stood at arms' length. At this juncture Rice employed Judge Rose, an eminent attorney and a man of the highest integrity, and Col. Jas. A. Carriger, a lawyer of the same class and standing, to represent him; and Mr. Crump engaged R. E. L. Mountcastle, of the firm of Shields & Mountcastle, to represent him. Mr. W. N. Hickey, a lawyer of fine character and splendid ability, had theretofore been representing Mr. Crump, but ceased to take an active part in the controversies at the request of Judge Rose, his law partner. Nevertheless, Mr. Hickey admits that he afterwards saw the instrument which was drafted on the 17th day of June, and that he warned Mr. Crump to be careful or else

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Rice would get the better of him. There is no direct evidence that Mr. Mountcastle was present when the instrument was drafted. He undoubtedly, however, advised Mr. Crump in the matter, for he was afterwards paid a fee of \$50 for the attention given by him to Crump's interests in making the settlement.

Crump and Rice met in Judge Rose's office, and the one or the other or both gave him the data from which the instrument was to be drawn. It recited in substance that a controversy had arisen as to whether the instrument of January 10, 1900, was a mortgage and whether certain payments therein provided for were rents or usurious interest. It proceeded to recite that the parties, in consideration of the premises and the payment by Mr. Rice of an additional one thousand dollars, all controversies between them should be compromised and settled, and that the former instrument, or at least the instrument then being drawn, was to be treated as a deed of conveyance and the payments provided for to be known as rents. There were repetitions of many things that were included in the instrument of January 10, 1900. But notwithstanding this, it is apparent that the parties intended to and incontrovertibly contracted that Rice was the vendee and not the mortgagee. Much is said by learned counsel for appellant about the advancement of one thousand dollars by Rice at the time as being simply an additional loan and as conclusive evidence that there was a continuance of the relation of mortgagor and mortgagee. This is persuasive indeed. But we are of opinion that this was an additional *consideration* for a conveyance of a consideration for an adjustment of all relations between the parties, and hence that the equitable rule contended for is not applicable.

Let us look at the parties as they were, detached from the overshadowing rules of equity which very able counsel

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continually bring to bear. We can draw no other inference than that Crump was at that time free from the dominance of Rice, and that he was suspicious of him and reposed in him no confidence. Crump was also a man of intelligence and of some experience, although not of very great business capacity. He had the advice of eminent counsel. It is true that he was in necessitous circumstances, and this is always a phase in scrutinizing the relations of mortgagor and mortgagee; but he was in the situation where he could either stand upon his rights and equities as a *quasi*-mortgagor or surrender his equity of redemption for certain additional considerations. Our conclusion is that he elected to do the latter, and that he acted knowingly and without anything done by Rice *fraudulently* or unlawfully to take advantage of his poverty. When such is the case and there is no great disparity between the price named and the value of the property, equity affords no relief, or at least will not compel the vendee to assume the relation of mortgagee or trustee.

We have examined several cases and authorities in which a surrender of the equity of redemption was made by an impecunious mortgagor. We believe the sound rule deducible therefrom is that if the mortgagee is not oppressing or imposing upon him, and affords him an election to redeem according to the old relation, or to enter into a new contract whereby the equity of redemption is relinquished for an adequate consideration, the transaction will not be disturbed.

An important feature of this transaction is that his rights were not entirely cut off and surrendered to the mortgagee. There was only a change from that of mortgagor to that of lessee with the right to re-purchase. A different case might be up for decision if Rice had taken in absolute conveyance and turned Crump out of doors.

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Another factor is that there was a compromise of differences. Let it be granted that there was a serious dispute as to the nature of the instrument of January, 1900. This was a controversy of substance and of doubt. It was also a justiciable case. The parties met and for valuable and mutual considerations undertook to settle these issues and fix their respective rights. We do not think that fraud or imposition entered into the transaction in any way; and if not a Court of equity is powerless to disturb the adjusting arrangement.

As before stated, Judge Rose was an eminent lawyer and a man of splendid character. He evidently thought that he was settling all the issues between the parties. He had interpreted the former instrument as being a deed; and it is beyond controversy that he conceived himself as drafting a contract whereby the parties were to assume the relation of vendor and vendee and lessor and lessee. It is shown that he repeatedly stated that he was drafting or had drawn such a document. We are persuaded that if the instrument had been of another character, Judge Rose, with his keen appreciation of matters of law, would have sensed it at that time and would have drawn a different paper.

In January, 1908, a new lease for three years was executed. It is unnecessary to defer to its provisions, except that Crump was therein vested with exclusive agency to sell at any sum exceeding \$13,500, the excess of which would be treated as commissions. This lease also contained the provision that if the property should be slightly damaged by fire, Rice would repair the same speedily, but that if a serious fire should occur, or the property be totally destroyed, the lease should be treated as at an end if Rice so elected. There is no stipulation of this instrument which stamps it as a mortgage.

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On February 11, 1911, another lease was executed. This agreement is different from the preceding ones in two important respects. The rents to be paid were in the round sum of \$140.00 per month and were not to be used by Rice as theretofore for the purpose of maintaining insurance and paying taxes. In the next place, there is an entire absence of any agreement that the insurance money, if any, was for Crump's benefit, nor is there any language which justifies the construction that Rice was to carry insurance for Crump or that Crump had any interest in the insurance to be taken. We also stated in this connection that the contention that there was a collateral agreement that the insurance should be carried for Crump's benefit, is not sustained by the proof. This lease also contained a permission or liberty in Rice to re-purchase.

In June, 1911, the hotel building and the greater portion of its furnishings were seriously damaged by fire. Rice immediately took charge of the premises and of the property and this possession was acquiesced in by Crump.

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We concur with the Chancellor in holding that there did not exist at the time of the fire the relation of mortgagor and mortgagee. This brings us to the next serious question presented in this case. It is urged by learned counsel that, failing to sustain the contention that Rice was the mortgagee, he should nevertheless be considered as a contracting vendor called upon by Crump to convey the legal title; or that Crump, having an option to purchase the premises, had the right upon acceptance, to demand a conveyance at the stipulated price less insurance money which had been collected by Rice. The contention of Crump is that upon either of two theories he was entitled to have this insurance money credited upon the amount specified in the option. One of these theories, that

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the insurance money insured to his benefit by virtue of oral and written stipulation, must of course be laid aside as not sustained by the proof. His other theory is that he had an interest in the property at all times from February, 1911, until the day of the filing of his bill, such an interest as could be made the basis of a suit for specific performance and an accounting, and that upon his notifying Rice of the acceptance of his option, his right to take the property as damaged, less the insurance money, became fixed. It must be remembered that Crump is demanding specifically the insurance money, and not a mere reduction of price for the destruction of the property. (But we must not be understood as intimating that this would change the legal result. We are merely stating the exact question presented.)

The point up for adjudication is an interesting one, and it has been learnedly treated by counsel for both sides. With the written or oral agreement of Rice to carry insurance for Crump out of the record, Crump must recover, if at all, upon the legal or equitable principles suggested by the question.

What were the rights of the parties? The authorities are all one way that an option to sell real estate is a mere offer to sell which may be withdrawn at any time before acceptance if without consideration, or which may be recalled at the expiration of the stipulated time even if founded upon a consideration: *Bradford v. Foster*, 87 Tenn., 4. Until acceptance the owner is a mere offeror. He still retains the land and is charged with its duties and its liabilities and must sustain all losses. The optionee has no interest whatever in the property. His utmost right is simply the power to compel a conveyance when he accepts upon the terms and conditions prescribed in the option. He cannot be said to be charged with any responsibility

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as an owner, nor can he be held to sustain any losses that may occur in the meantime. *Eo converso*, he can reap no undue or unanticipated advantage from the optioner.

It is true that his acceptance relates back to the date of the option; but this is a fiction which cannot have uniform operation in a sound system of jurisprudence. At least it must not be allowed a lagging optionee for the purpose of working injustice or taking an undue advantage of his optioner.

While there are decisions in other jurisdictions sustaining the view that the acceptance relates back and that the optionee is entitled to an abatement to the extent of insurance money collected by the optioner in the interim, we are of opinion that the contrary is the sounder, the better and the more logical rule. The case most earnestly relied upon by learned counsel is that of *Williams v. Lilly*, 37 L. R. A., 523. We have analyzed this decision and are not disposed to extend to it that authority-force which is claimed for it. And the Court expressly curtailed it by stating that it was confined and governed by the peculiar facts. When so considered it may be treated as sound. But it cannot be cited as warrant for the general proposition that the optionee is entitled to credit for the insurance money collected. The great weight of authority is the other way: *Bowen v. Lansing*, 57 L. R. A., 647, note; Elliott on Contracts, 1918; *Edwards v. West*, 7 Law Reports, 858 (Eng.); *Gilbert v. Port*, 28 Ohio, 276; *Caldwell v. Frazier*, 68 Pac., 1076; *Stembridge v. Stembridge*, 87 Ky., 91, and numerous other authorities which could be named. See also *Phinizy v. Guerney*, 50 L. R. A., 680. This case is relied upon by appellants. A close analysis, however, will show that the Court took the same view which we entertain, that the optionee was at least not entitled to credit for insurance money collected before acceptance.

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The Court pertinently stated that if the optionee had more than a mere right to purchase, the rule would be different.

But counsel earnestly insists that when all the contracts of the parties, including the last, are construed, Crump was invested with more than a mere option to re-purchase, and that the stipulations amounted to an equitable conversion of the land into property, held by Rice as trustee. It is also contended that Rice was absolutely bound to convey. If so, then the claim for insurance money would have some strength and basis. But we doubt the universal application of the rule with respect to cases of absolute contracts to convey. It is not accepted in England, nor is it approved by some of the ablest Courts of this country: 10 L. R. A. (N. S.), 1025. But however it may be as to contracts which obligate the owner to convey upon request, we are convinced that the rule does not apply to an optionee who chooses to wait until after the destruction of the buildings and then elects to take at the stipulated price less the insurance money collected. This would be permitting him to acquire property without the consent of his vendor. The destruction of the buildings should be treated as working such a change as to interrupt or put an end to the contractual relations of the parties and to take away the right to insist upon specific performance. This is logical. The parties contracted in this case with reference to the buildings and furnishings mainly. It is not unreasonable to hold that upon the destruction of the subject-matter of the contract, the stipulation with respect thereto should end. It would be impossible for the Court to reconstruct the agreement so as to meet the equities and wishes of the parties. Hence, its abstention from an effort so to do. It might be that whenever there are slight changes specific performance might be decreed. But the better rule is to deny this whenever material changes bring about a situa-

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tion not contemplated, necessitating, if relief is to be granted, a substantial readjustment of the contract obligations. It would be difficult to conceive how this could be done by a Court of equity.

Crump having no substantial interest in the property, we are of opinion that his election subsequent to the fire gave him no interest in the insurance money: 39 Cyc., 1232, 1244. Any other construction would permit the optionee to speculate upon the misfortunes of the option giver and permit him to accept or reject just as advantage would in his opinion accrue to him, thus allowing him to blow both hot and cold. The authorities mainly relied upon for the contrary view have reference to the situation of mutual and binding contracts to convey rather than those accruing under a mere option: Pomeroy, Vol. 6, 860, Ed. 1905; *Reed v. Lukens*, Am. Dec., 425; *Skinner v. Houghton*, 84 Am. State, 485; *Phinzy v. Guernsey*, 50 L. R. A., 680; *Williams v. Lilly*, *supra*. It is true that there are some authorities which hold the same doctrine with respect to options. But we decline to give them our approval. The Tennessee cases of *Hayes v. Ferguson*, 15 Lea, 1, and *Bank v. Insurance Co.*, 2 Tenn. Chy. App., are not applicable to contracts and to situations such as Crump and Rice occupy, and hence need not be commented upon. We have found that the relation of mortgagor and mortgagee did not exist, and this is sufficient to show the inapplicability of those decisions.

It is not worth while to discuss the features of usury, damage to property and other things mentioned, as these questions were wholly dependent upon the two controlling issues which we have disposed of adversely to Crump. The decree of the Chancellor is affirmed. Appellant will pay the costs.

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B. F. MARR v. FRANK MURPHY.

Affirmed by the Supreme Court, at Knoxville, 1915.

1. **EXTORTION. *Official. What is.***

Extortion is the demanding or receiving by an official of more fees than those prescribed by law or fees not allowed by law or fees before they are due.

2. **SAME. *Demanding or receiving.***

There is no distinction in this State between the demand for fees or the receiving of them by voluntary payment.

3. **SAME. *Receiving pay for criminal process before trial.***

A Justice of the Peace who receives a statutory fee for a criminal warrant at the time of the issuance or before trial is guilty of the offense of extortion.

FROM KNOX COUNTY.

Appealed in error from the Circuit Court of Knox County. L. D. SMITH, Special Judge.

CHARLES ROBERTS for Plaintiff in Error.

JOHNSON & Co. and J. R. PENLAND for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

PLAINTIFF brought this suit to recover the penalty prescribed in section 6353 of Shannon's Code, from the defendant Murphy upon the ground that he was at the time

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a Justice of the Peace, when he received from him a fee of fifty cents for the issuance of a state warrant when the plaintiff did not owe the fee, because the Justice had no right to receive it from him. The cause was tried by Special Judge L. D. Smith, without a jury, and he found the matters in controversy against the plaintiff and dismissed his suit. The case is brought to this Court for a review of the facts as found by the Special Judge, and of his conclusion of law. It seems that, after the proof was heard in the case, the defendant requested the Special Judge to reduce his findings of fact and his conclusions of law to writing. This request was made after the proof was heard and before the Judge had rendered his decision, and it is insisted that the request came too late and should have been made when the trial of the cause was entered upon. This is a mistaken idea of appellant's learned counsel. If the request is made at any time before the judgment is rendered, it is a compliance with the statute.

In the case of *Stanley v. Donoho*, 16 Lea, 45, the request was made by the Defendant Stanley after the evidence was heard and before the judgment was rendered. The learned Circuit Judge, believing the request came too late, declined to do as requested, and for his failure the Supreme Court reversed the case.

Under that decision we must necessarily hold that the request for a written finding of law and fact made in this case, came in ample time to comply with the statute, and for that reason the assignments raising this question are overruled.

It is next insisted that there is no evidence in the facts as found by the learned Special Judge, or in the record, that sustains the conclusions of law reached by him. It is next insisted that the evidence as found by the trial Judge and reported in his findings of fact, make out a case of

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statutory extortion against the defendant, which entitled the plaintiff to a judgment for the fifty dollars penalty. It appears that Plaintiff Marr is an old man, seventy-three years of age, and that the defendant, Murphy, is a Justice of the Peace for Knox County, Tennessee, having an office on Market Street, in the City of Knoxville; that one day in July, 1914, Mr. Marr applied to Defendant Murphy for the issuance of a state warrant against one, Tom Hillard, charging him with a felony, and inasmuch as the Special Judge, in his written findings, states the facts as testified to by defendant, we will copy his testimony in regard to the matter. It is as follows:

"Plaintiff Marr came to my office to secure a state warrant against said Tom Hillard for a felony. I wrote out the warrant and plaintiff signed it as prosecutor. I then completed the warrant by signing my name thereto in my official capacity. When I had completed said warrant and had folded the same up, plaintiff asked me what it was worth, twenty-five cents?—and I said fifty cents for a state warrant and twenty-five cents for civil warrant. Thereupon plaintiff paid me fifty cents for issuing this warrant, which I accepted. Whereupon plaintiff told me that he wanted a deputy sheriff by the name of Householder, to execute this warrant, that Householder knew Hillard and that Hillard lived up in the country from Knoxville; but plaintiff insisted on me giving him the warrant, which I did, and thereupon plaintiff took the warrant and left my office with it. I deny that I had demanded of plaintiff fifty cents for issuing the warrant. Defendant claims that he told plaintiff when he left the office with the warrant, that if the warrant was returned before him that the cost would be taxed and that plaintiff would get his money back. Defendant admitted that plaintiff did come back to his office two or three days later, and

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stated that the officer, Housholder, would not serve the warrant, because defendant had collected fifty cents from plaintiff for issuing it; defendant, however, denied that plaintiff on this occasion demanded his fifty cents back. Defendant stated that when plaintiff returned to his office with the warrant, that there were other officers of the law present who stated to him that they would execute the warrant for him, but that plaintiff walked out of his office, taking the warrant with him. Defendant stated that he never mentioned money to plaintiff or even thought of any charge for the warrant until he, plaintiff, mentioned and offered the fifty cents to him. Defendant only took the fifty cents on the ground that plaintiff offered it to him for the reason that the paper was to be executed and returned before another J. P., if at all. The payment of the fifty cents by plaintiff was voluntary and not demanded or suggested on the part of defendant."

The foregoing is the defendant, Murphy's, statement of what was said at the time plaintiff paid defendant and the latter received the fifty cents mentioned in the testimony copied above, and it is for us to determine on this statement by the defendant, and on it alone, whether he was guilty of extortion in receiving plaintiff's fifty cents, and is, therefore, liable for the penalty prescribed in section 6353 of Shannon's Code. The learned trial Judge reached the conclusion, on this testimony, that the Justice was not guilty of extortion in receiving this money from the plaintiff. While conceding that the Defendant Murphy could not, at that time, have compelled plaintiff to pay the fee to him, for the reason that plaintiff would only be liable for the fee, in the event judgment was rendered against him as prosecutor in the case, on the ground that in suing out the warrant his action was frivolous or malicious, and in no event would plaintiff be liable until such judgment was

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rendered against him for the cost of the criminal prosecution upon the grounds stated, yet the learned Special Judge was of the opinion, "before an officer can be held under the statute for receiving illegal fees, the evidence must show that they were either exacted or the payment made unwillingly; that the mere receiving in advance fees from litigants who are not bound to pay the same but who pay willingly and voluntarily, is not a violation of the statute."

It seems the learned Special Judge placed his decision altogether upon the ground that the plaintiff, in this suit, willingly and voluntarily paid to the defendant the fifty cents for the issuance of the criminal warrant, and he was of the opinion that in such a case, the officer cannot be held on a charge of extortion. We find ourselves unable to agree with this view of the law controlling the facts of this case. It is clearly evident, in fact, almost conclusive, that this old man, being then seventy-three years old, and probably with but little experience in such matters, believed that he owed the magistrate this fee for the issuance of the criminal warrant. Manifestly, he would not have offered to pay it if he had then known, or even believed, that he was not then liable for it, and in no event, unless a judgment was rendered against him for it because his prosecution was malicious or frivolous. It seems clear to us that he was ignorant of his rights at the time, and wholly without knowledge of his duty or obligation in the premises. The Justice well knew the plaintiff was not due him this fee, and he also well knew that in no event would the plaintiff be liable for this fee unless judgment was rendered against him on account of the fact that the prosecution was frivolous and malicious. The Justice well knew that the fee was not then due him, even if the plaintiff was under a legal obligation to pay it, and

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from his own testimony we are constrained to the belief that the Justice well knew that this old man was ignorant of his liability for this fee, and did not then know that he was under no legal obligation at that time to pay it. According to the evidence of the Justice, the affidavit had been made, the warrant filled out and signed by him, before anything was said about the payment of the fee, and it was after this work was completed that the plaintiff mentioned the amount due for the services of the Justice. Taking his own statement as true, as we are bound to do, the plaintiff had not, at that time, said anything about who he would get to serve the paper. According to the Justice's testimony, the conversation about Householder executing it came up after the plaintiff had paid the fifty cents, and it is clear that the Justice did not accept this fee because he thought, or believed, the warrant would not be returned before him for trial of the case. He states that when plaintiff left his office with the warrant, the Justice told him if it was returned before him, the cost would be taxed and he would get his money back. He does not claim that he informed plaintiff that he, the Justice, would pay back the money, or how it would be paid back to him. The defendant made no explanation, according to his own testimony, to the plaintiff how he would get his money back. Neither did he explain to him, the plaintiff, that he need not pay this fee, and would not have to do so in any event, unless a judgment should be rendered against him for the cost of the criminal prosecution.

The defendant denies that he demanded the fifty cents from the plaintiff. He states, in his testimony, that he "only took the fifty cents on the ground that plaintiff offered it to him for the reason that the paper was to be executed and returned before another J. P., if at all." This last statement does not at all comport with his testi-

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mony to the effect that when he had completed the warrant and folded it up that plaintiff then asked him what it was worth, and paid him fifty cents for issuing it." In his testimony he says that after the payment was made the plaintiff then informed the defendant that he wanted Householder to execute the warrant, and of course if this statement is true, it cannot be true that defendant accepted the fifty cents "for the reason that the paper was to be executed and returned before another J. P.," for at the time of such payment the Justice did not then know that the paper was not to be returned before him.

Section 6352 of Shannon's Code provides that, "no officer is allowed to demand or receive fees, or other compensation, for any service further than is expressly provided by law."

Section 6353 is as follows: "Extortion.—If any officer demands or receives any other or higher fees than are prescribed by law, he is liable to the party aggrieved in the penalty of fifty dollars to be recovered before any Justice of the Peace, and is guilty of a misdemeanor in office," and it is under these two sections of the Code, and on the facts of this case, that plaintiff seeks a recovery in this suit.

Under section 6714 of the Code, a further provision is made in regard to extortion by officers, which section is in the following language: "For any person knowingly to demand and receive of another, for performing any service or official duty for which the fee or compensation is established by law, any greater fee or compensation than is legally allowed or provided; such officer is guilty of extortion in the respect designated in this section, and is subject to indictment and punishment therefor." The fee extorted by the officer may not be any greater than that allowed by law, yet, if not due at the time it is demanded

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and received, the officer is guilty of extortion. It may be the exact fee allowed by the law to the officer, yet, if it is not due and payable when it is demanded and received, the officer is guilty of the offence of extortion. *State v. Cooper*, 120 Tenn., 552.

Extortion was defined by our Supreme Court in the case of *Williams v. State*, 2 Sneed, 161, as follows: "It is the taking, by color of an office, money or other thing of value, that is not due, before it is due, or more than is due."

In *Garvin v. Glisson*, 6 Pickle, —, the Supreme Court says, "where an officer charges or demands any other or higher fee, or charges compensation than such as is fixed by law, then he is guilty of extortion and is liable to the penalty imposed by the statute."

In *State v. Cooper*, *supra*, Mr. Justice Shields, speaking for the Supreme Court, adopted the definition of extortion quoted, *supra*, from *Williams v. State*, and also the definition given in 2 Wharton's Criminal Law, section 1574, as follows: "Extortion in its general sense signifies any oppression by color of right; but technically, it may be defined to be the taking of money by an officer by reason of his office, either where none is due or where none is due yet." In the case of *State v. Cooper*, it appears that the Justice, in that case, demanded and received from the defendant in a criminal prosecution, who was then under arrest on a warrant charged with assault and battery, a fee of fifty cents for taking an appearance bond before the fee was due. The Justice is allowed by statute a fee of fifty cents or taking an appearance bond, but it was held by Mrs. Justice Shields that, while the Justice was entitled to the fee, it was not then due him and that he had "no right to collect his fee of fifty cents for taking a bail bond until it had been adjudged upon some disposi-

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tion of the case by final judgment that the defendant was liable for it." In other words, at the time the Justice demanded and received the fifty cents, it had not then been adjudged that the defendant in the criminal prosecution was liable for it, and it might never be so adjudged, and if not, the defendant in such prosecution would not be liable to the Justice for the fee. But, because the Justice demanded and received the fifty cents before it was due, the Supreme Court held him liable to indictment and conviction for such demand and receipt of the fee, although it was exactly the amount the law allowed him. The learned Justice said, in *State v. Cooper*, "there is no doubt but that under it the collection of a fee before it becomes due and payable is extortion."

In *Plyley v. Allison*, 113 Tenn., 500, it appears the Clerk of the Circuit Court charged Mr. Allison a fee of fifty cents for executing and delivering to him receipts for taxes due on twenty-one pieces of real estate which had been sold for taxes and were then being redeemed by Mr. Plyley. He thought the Clerk should execute but one receipt for all the tracts of land redeemed by him, and for this he would be liable to the Clerk, Mr. Allison, only one fee of fifty cents, while the Clerk was of the opinion that he was entitled to issue, and it was his duty to issue, twenty-one receipts, one for each tract redeemed, and to charge Mr. Plyley fifty cents for each receipt so issued to him. It was not controverted in that case but that the Clerk was entitled to a fee of fifty cents, but it was insisted he was only entitled to one fee, while he thought he was entitled to twenty-one fees. It was conceded the Clerk acted in good faith and according to the custom in vogue in his office before he was inducted therein; but it was held that the fact that he acted in good faith and under the direction of the Comptroller of the State, did not excuse him from

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the penalty prescribed in the Code and quoted, *supra*. The case of *State v. Merritt*, 5 Sneed, 67, was cited by the Supreme Court in support of its holding, that the good faith of the Clerk did not excuse him from the penalty. That citation is as follows: "This defendant doubtless honestly believed he was entitled to the fee charged, and we very much regret the necessity we are under to declare the law in this case to be against him. But the principle that it is extortion to exact fees not allowed by law is indispensable for the protection of the people and cannot be relaxed. Every officer must beware that he takes no compensation not sanctioned by some law on the subject. He collects costs at his peril and for each and every item must be able to put his finger on some particular act."

In *Plyley v. Allison*, *supra*, the Clerk did not demand any other or higher fee than is prescribed by law. The amount of each fee demanded by the Clerk was that prescribed by law—not any other or higher fee, but the same fee. The trouble was, he charged fees prescribed by law when they were not due him—not other or higher fees, but fees not due him. The Court held him liable for the penalty provided for in section 6353 of the Code.

It is insisted in the case at bar, that because the fee received by defendant was the same as that prescribed by law, that he is not, for that reason, liable for the penalty; that the fee received must be other or higher than that prescribed by law. The majority of the Court is of the opinion that this is too narrow a construction to place on the statute. If the fee is not due, though it is the same fee prescribed by law, he is liable for the penalty.

In the case of *Williams v. State*, *supra*, Mr. Justice Caruthers, speaking for the Court in regard to extortion by officers says: "This is regarded, in the law, as a very odious offense, and when made out should be rigidly pun-

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ished by the Courts. There is too much reason to believe that many public officers, taking advantage of the trust and confidence of the people, and their want of information on the subject, together with a general reluctance of suitors to enter into a contest or incur the enmity of those in office, for small amounts, are guilty of much abuse on the subject of fees." That was said by Mr. Justice Caruthers in 1854, more than a half century ago; and what was true then is equally as true now; for we know that it is sometimes true, but we hope not often, that public officers do take advantage of the trust and confidence of the people and their want of information on the subject of fees, and are guilty of great abuses in exacting or collecting fees not due them. We do not want to be understood as holding in this case that the defendant, Mr. Murphy, has been guilty of such an abuse in office as that condemned by Justice Caruthers in *Williams v. State*, and quoted, *supra*. This may be, and we trust it is, his first offence, and yet, we cannot close our eyes to the fact that some Justices in the cities of this State, are guilty to some extent of the abuses so justly condemned by the learned Justice in the quotation made above.

It is said the defendant is not liable for this penalty first, because the fee he received was no higher or other than the fee prescribed by law. We concede it was not greater, or higher, than prescribed by law, but we do not think that fact makes any material difference. The fee was received by him by color of his office. There can be no doubt of that. It was paid by the plaintiff to him for issuance of a state warrant, which the defendant had just issued and delivered to the plaintiff. It would not have been paid but for that fact. No fee was due by the plaintiff at that time to the defendant, and never would be due by him unless there was a judgment entered against him

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for the cost of the criminal prosecution. While the fee collected was not higher than that prescribed by law, the defendant was not entitled to any fee at all at that time, and the plaintiff not liable then for it. The only fee the defendant was entitled to receive was that prescribed by law in criminal prosecutions, and for which final judgment has been entered either by him or some other Court of competent jurisdiction. In this particular case the Justice was entitled to a fee of fifty cents after final judgment had been rendered for the costs, and any other fee collected by him in such case, than one so adjudged, was not prescribed by law. This fee had never been adjudged, and was, for that reason, a fee not prescribed by law.

It might be true that the Justice would not be guilty of extortion, if the plaintiff had decided, after receiving the warrant, not to prosecute the case, but to let the criminal go, and after so deciding had then paid the Justice the legal fee prescribed by law. In such cases the Justice receiving his fee from the plaintiff might not be guilty of extortion; but that is not the case we have before us.

Does the fact that the plaintiff paid this fee to the defendant voluntarily and without demand on the latter's part, relieve the transaction from the charge of extortion, or relieve the defendant from being guilty of extortion? Does the fact that plaintiff voluntarily paid it without any demand being made on him by the defendant for his fee, and the receipt by the Justice of the fifty cents, under such circumstances, relieve the defendant from liability for the penalty for which this suit was brought? We do not think such voluntary payment, under the facts of this case, can have that effect. As we have said, it is manifest plaintiff thought he was liable and under legal obligation for the payment of the fee, and that it was his legal duty to pay it at the time he did. If such is true, the payment

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cannot then be said to be a voluntary one. It is further manifest that defendant knew that plaintiff was acting under a misconception of his legal rights, and it is also evident and in fact beyond dispute, that defendant knew that plaintiff did not then owe the fee and was under no legal obligation to pay it; and with this knowledge on his part when he received the fee from plaintiff, we think he was guilty of extortion and becomes liable for the penalty. As said in *State v. Merrit*, "every officer must beware that he takes no compensation not sanctioned by some law on the subject." In this case Mr. Murphy received, or took, whichever it may be termed, compensation, or a fee, not sanctioned by law. He collected it, or received it, or took it from plaintiff, at his peril, and should be able to put his finger on the particular statute that authorized him to receive it, or to collect it, or to take it, even though it was voluntarily given to him by the plaintiff for the services defendant rendered in issuing the State warrant.

We do not think that willingness to pay, or the voluntary payment of the fee, has anything to do with the question. It is the willingness to receive, and the actual receipt of a fee that is not due at the time of payment, that controls. The Statute makes the officer liable for the penalty, not only when he exacts payment, but also when he receives other fees than are prescribed by it. The law did not prescribe, or require the prosecutor to pay this fee, except in certain contingencies, and, therefore, this Justice received a fee other than is prescribed by law, and a fee to which he was then not entitled under any statute. We are furthermore of the opinion that the willingness of plaintiff to pay is not at all controlling. The Statute makes no such distinction or exception, but says if the officer exacts or receives other or greater fee than is prescribed by law, he is liable for the penalty. If the officer

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exacts it, he is certainly liable, and if he receives the fee, whether he demands or exacts it or not, he is liable. The receipt of the fee implies that it was willingly given by the donor, not exacted by the donee. It was to cover just such case as this one, that the officer was penalized for receiving a fee not due him, or before due him. He has no right to either exact or to receive a fee not due him, no matter if it is willingly paid him. It was paid defendant in this case, not given to him by plaintiff, and for receiving such fee in payment of what was not due he is liable for the penalty.

On neither of the grounds suggested do we think the defendant can escape liability for this penalty, and for the reasons stated, the judgment of the Circuit Court is reversed, and a judgment will be entered in this Court in favor of the plaintiff and against the defendant for the penalty of fifty dollars sued for and all the costs of the cause.

Judges Hughes and Higgins dissent, being of opinion that Murphy acted innocently, with no thought of extorting anything or oppressing Marr; and they are of opinion that our statutes should be construed with some strictness when it comes to penalizing officials; that Murphy was the recipient of money under circumstances that were peculiar and such as *would repel any idea that he was securing any advantage or emolument by color of his office.*

Cattelle v. Express Co.

W. R. CATTELLE v. SOUTHERN EXPRESS COMPANY.

Affirmed by Supreme Court, 1914.

1. CARRIERS OF GOODS. *Express company. Interstate shipments. Declared value.*

The agent of plaintiff in error shipped to New York City a package containing diamond rings. He did not inform the company of the contents and declared no value. Among other provisions of the express receipt was the clause that the rate was fixed upon the assumption that the value of the goods or any claim therefor should not exceed fifty dollars. The goods were lost in transit. *Held*, That the owner could not recover more than \$50 of the Express Company. *Held further*, That the owner was bound by the action of his agent.

2. SAME. *Negligence of agent. Liability.*

The owner of such goods cannot hold his agent liable for the value thereof upon the theory of negligence where the agent acted in good faith and pursuant to a custom obtaining between his principal and himself.

FROM DAVIDSON COUNTY.

Appealed from the Chancery Court of Davidson County.
JOHN ALLISON, Chancellor.

LEMUEL R. CAMPBELL and JAMES S. PILCHER for Complainant.

CHAS. C. TRABUE and WALTER STOKES for Defendants.

MR. JUSTICE HALL delivered the opinion of the Court.

Cattelle v. Express Co.

THIS bill was filed by the complainant, W. R. Cattelle, against the defendants, Southern Express Company, and George R. Calhoun & Company, of Nashville, to recover the value of a package of Montana Sapphires, the alleged value of said stones being \$502.60.

The Chancellor dismissed the bill; taxed complainant with the costs; and he has appealed to this Court and assigned errors.

The complainant, W. R. Cattelle, was a dealer in precious stones in the city of New York, and the defendants, Geo. R. Calhoun & Company, were jewelers in the city of Nashville.

On July 19, 1910, at the request of George R. Calhoun & Company, complainant expressed to them the stones in question for examination, Calhoun & Company being prospective purchasers. They had the privilege of returning the stones in the event they did not decide to purchase. The stones were forwarded to the defendants, Geo. R. Calhoun & Company, by the complainant by express; Geo. R. Calhoun & Company having received the stones and inspected them, and having decided not to purchase any of them, repacked and delivered them to the Express Company addressed to complainant, "7 Maiden Lane, New York." The stones were lost while in transit between Nashville and New York, and were never delivered to the complainant by the Express Company. The value of the stones was not declared to the Express Company by complainant in making the shipment to Geo. R. Calhoun & Company, nor was a value declared upon them by Geo. R. Calhoun & Company in re-shipping them to complainant.

The proof shows that it had been the custom between the complainant and defendants, in shipping to defendants stones of similar character for inspection, defendants would pay the transportation charges on them from New York

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to Nashville, and if they did not purchase, they would return the stones to complainant, who would pay the express on them from Nashville to New York, the stones being sent "collect", and the charges collected by the Express Company at the New York office.

The evidence further shows that it was the custom, and according to the course of dealing between the complainant and Geo. R. Calhoun & Company not to declare any value on the goods in making shipments in this manner.

The receipt issued by the Express Company to Geo. R. Calhoun & Company for the shipment in question contained the following provisions:

"This company's charges are based upon the value of the shipment and classification thereof, which must be declared by the shipper."

Then follows a record of the shipment, and then the following provision: "Which the company undertakes to carry, but not beyond its own lines, subject to the following conditions, and which are expressly agreed to by the shipper or owner in accepting this receipt:

"I. In consideration of the rate charged for carrying said property, which is regulated by the value and classification thereof, and is based upon a valuation of not exceeding fifty dollars for any shipment of one hundred pounds or less, and not exceeding fifty cents per pound for any shipment in excess of one hundred pounds, unless a greater value is declared at time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars (\$50.00) on any shipment of one hundred pounds or less, and for not exceeding fifty cents per pound on a shipment weighing more than one hundred pounds, and said property is valued at, and the liability of

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the company is hereby limited to, the value above stated, unless a greater value is declared at the time of shipment, and the charge for value paid or agreed to be paid therefor; and in case of partial loss or damage the company shall not be liable for more than such proportion of the same as \$50 if one hundred pounds or less in weight, or fifty cents per pound if weight exceeds one hundred pounds, or the value declared bears to the actual value if greater."

Mr. Tyler Calhoun, of the firm of Geo. R. Calhoun & Company, testified that his firm was aware of and understood the foregoing provision in said receipt, and knew that the rate at which the goods would be transported by the Express Company was to be based on the value declared by the shipper, and if no value were declared by the shipper, then the goods would be transported at a valuation of \$50.00. That the rate for the shipment in question at a \$50.00 valuation was twenty-five cents, whereas, if the full value of the shipment had been declared, the rate would have been \$100, or four times as much as the rate based on a valuation of \$50.00.

We should have stated that the Express Company conceded its liability to the complainant for the sum of \$50.00, as per the terms of the receipt issued by it for the shipment, and tendered this amount to the complainant before the bill was filed.

We are clearly of opinion that complainant was bound by the stipulated value of the stones contained in the Express Company's receipt, in the absence of a greater value being declared by Geo. R. Calhoun & Company, who must be held to have been the agents of complainant in making the shipment.

The undisputed proof shows that the Express Company's rates had been filed with and approved by the Interstate Commerce Commission, as required, and complainant's

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agents fully understood the measure of the Express Company's stipulated liability in the event of loss of the goods.

The cause, in so far as the Express Company is concerned, falls within the rule announced in the case of *Adams Express Company v. Croninger*, 226 U. S., 491, L. Ed., 314, wherein the Supreme Court of the United States, in construing a contract of the Express Company, which was identical in terms with the contract in the suit at bar, said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater."

It is argued, however, that the goods were shipped by Geo. R. Calhoun & Company "collect", and no rate or charge was agreed upon between them and the Express Company, and that, therefore, the Express Company had the option of collecting charges based on a greater valuation than that stipulated in the receipt or contract of shipment upon the arrival of the goods in New York; and this being true, the contract was not binding upon complainant.

We think this contention is without merit. The receipt stipulated that, in the absence of a greater declared value by the shipper, the valuation should not exceed \$50.00 for any shipment of one hundred pounds or less, and not exceeding fifty cents per pound for any shipment in excess of one hundred pounds. This expressly fixed the value of the shipment, which governed the rate to be charged by the Express Company.

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It is insisted by complainant in one of his assignments of error that Geo. R. Calhoun & Company was guilty of negligence in failing to declare the value of the stones at the time of their delivery to the Express Company, and in addressing the stones to complainant at "7 Maiden Lane, New York", when the memorandum accompanying the stones showed that complainant had removed from "7 Maiden Lane" to "180 Broadway".

We are of opinion that this contention is not well grounded. The proof shows that complainant did not declare any value on the stones in shipping them by express to the defendants, Geo. R. Calhoun & Company, and Geo. R. Calhoun & Company had no instructions from complainant to value them in the event they were returned. In other words, Geo. R. Calhoun & Company returned them in the same manner they received them. Furthermore, the proof shows that, in previous similar shipments between complainant and Geo. R. Calhoun & Company, it had been the custom to ship such stones without declaring any value upon them.

It is insisted by complainant in one of his assignments that the Chancellor committed error in admitting, over the objection of complainant, evidence tending to show a custom among jewelers not to value stones of like character when delivering them to the Express Company for shipment.

We are of opinion that this was not error. We think it was competent to show the previous course of dealing between the parties as to such transactions, and any custom that existed with respect to such transactions.

The fact that the stones were addressed to complainant at "7 Maiden Lane" instead of "180 Broadway" is immaterial. It is conceded, as we understand the record, that the stones were lost in transit and never reached New

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York. If they had reached New York, however, it would have been the duty of the Express Company to have delivered them to no one except the consignee, whether at "7 Maiden Lane" or "180 Broadway".

We do not think it can be said, in view of the undisputed facts, that Geo. R. Calhoun & Company were guilty of actionable negligence in the shipment of the stones. The Express Company has not the full measure of its liability by tendering to the complainant the stipulated value of the stones, which tender was paid into Court by the Express Company with its answer.

Without further discussion of the cause, it suffices to say that we are of opinion that none of complainant's assignments of error are well taken; that the decree of the Chancellor was correct in all respects, and the same is affirmed with costs.

Head v. Insurance Co.

A. L. HEAD v. NATIONAL LIVE STOCK INSURANCE COMPANY.

Affirmed by Supreme Court at Nashville, 1914.

1. LIVE STOCK INSURANCE. *Notice of injury.*

Provisions in a live stock insurance policy requiring immediate notice of injury or sickness is reasonable, and must be complied with by the insured.

2. SAME. *Notice whether the injuries are serious or trivial.*

It is the duty of the policyholder to give the required notice whether the injury or sickness of the animal be serious or trivial, if he expects to seek indemnity from the company.

3. SAME. *Waiver of notice by demanding proofs of loss.*

The insurer does not waive the failure to give notice by requesting the owner to furnish proofs of loss.

FROM MARSHALL COUNTY.

Appealed in error from the Circuit Court of Marshall County. JOHN E. RICHARDSON, Judge.

W. P. McCLURE for Plaintiff in Error.

MARSHALL & MARSHALL for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS suit was instituted before a Justice of the Peace of Marshall County by the plaintiff in error, A. L. Head, against the National Live Stock Insurance Company, to recover upon a live stock insurance contract issued by said

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company to the plaintiff in error upon certain live stock described therein, for the death of a mule covered by said policy, and which died while the policy was in force. The policy insured the animals against death by accident, disease, theft, or by reason of a broken leg when found necessary by attending physicians to destroy the animal's life, with the exceptions set forth and printed on the back thereof, which are especially referred to and made a part of the policy. Exception No. 1 reads as follows:

"The perils indemnified against by this policy do not include death from any cause where the assured does not render forthwith by telegraph or telephone to the company at its home offices, 504 Central Union Telephone Building, Indianapolis, Indiana, notice of any sickness or accident with which any of the animals insured may become afflicted; death occurring from castration, foaling, or during transportation; death resulting from sickness or disease contracted or accident occurring prior to the delivery of this policy; death of any animal which is caused by any person whether acting under or by virtue of any law, or otherwise."

The undisputed proof is that the mule in question died from septicemia resulting from a stab or wound in the right hind foot. Although the plaintiff in error knew of the injury some three days before the mule's death, he gave no notice to the company as required by the provisions of the policy above set out. He did, however, give the company's agent notice of the mule's death immediately thereafter. The company refused to pay the plaintiff in error's claim, and relies upon his failure to give it notice of the mule's injury by telephone or telegraph as provided in the policy, as a complete defense to his right to recover.

The case was tried in the Court below before the Circuit Judge without the intervention of a jury, and the defense

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made by the Insurance Company was sustained; the plaintiff in error's suit was dismissed, and he was taxed with the costs of the cause. He has appealed to this Court, and has assigned errors upon the judgment.

We are of opinion that there is no error in the judgment of the Court below. We think the provision requiring notice to be given at once of the injury was mandatory. The plaintiff in error testified that the reason he did not notify the company was, he did not regard the injury as serious. The proof shows that he knew the mule was lame on Thursday before it died the following Monday, and on Saturday called in a veterinarian, who examined the mule; removed a stick from its hind right foot, and gave the plaintiff in error some medicine with which to treat the foot. It is true that the veterinarian did not regard the injury as serious, and so advised the plaintiff in error, telling him that he thought the mule would be all right in a day or two, and the plaintiff in error testifies that the mule did seem to improve, but grew suddenly worse on Monday, and died late in the afternoon.

It is insisted by plaintiff in error that the trial Judge erred in giving a strict construction of the provision of the contract requiring notice; that under a proper interpretation of said provision plaintiff in error was not required to give the company notice of an injury that he regarded as slight and trivial, but was only required to give notice to the company of a serious injury or illness. In other words, such as might produce the death of the animal.

We are of opinion that no such interpretation should be given the contract. If such interpretation were held to be proper, it would absolutely destroy the effect of such a provision, and would place the Insurance Company at the mercy of the judgment of the assured, whether it be

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good or bad. In other words, the assured might be of the opinion that the animal was not seriously injured or ill, when another person would regard the injury or illness as serious. The company had a right to contract for notice to be given at once of any injury or illness suffered by the animal insured, and such contract was binding on the assured and must be complied with by him. The purpose of the notice is to give the company an opportunity to have the animal attended by a competent veterinarian or other person while the disease or injury is in its incipency, or take such other steps as it may deem necessary to save the animal's life and save loss to the company. It is not a question of whether the assured regards the injury or illness as serious, but he must give the company notice of any injury or illness, according to the terms of the policy, if he expects to rely upon the policy and hold the company responsible in the event of the death of the animal.

Such provisions in policies of like character have been upheld in the following cases: *Green et al. v. Northwestern Live Stock Insurance Company*, 87 Iowa, 358; *Illinois Live Stock Insurance Co. v. Kirkpatrick*, 61 Ill. App., 74; *Alston v. Northwestern Live Stock Insurance Co.*, 7 Kan., 179; *Johnson v. Northwestern Live Stock Insurance Co.*, 107 Wis., 337; *Swain v. Security Live Stock Insurance Co.*, 165 Mass., 321.

Our own Supreme Court has held such contracts valid and binding, though not in live stock insurance cases, but in cases involving the shipment of live stock where the contract provided for notice, and in other character of insurance cases: *M. & O. R. R. Co. v. Brownsville Stock Co.*, 123 Tenn., 298; *Blackman v. Casualty Co.*, 117 Tenn., 578.

In the case of *Green et al. v. Northwestern Live Stock Insurance Company*, *supra*, the animal insured was af-

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fectured with "pink-eye," and continued sick for about one week. A surgeon was summoned the first day of the sickness and prescribed. He returned four days later, but gave no prescription, because he thought the animal was better. The policy contained the provision that the assured shall "at once notify the company or its nearest agent of the fact of such sickness or accident." The assured failed to comply with this provision of the policy. The Court said:

"Under the terms of the policy, if the insured failed to comply with the provision requiring notice of sickness or accident, there could be no recovery for the death of the horse; and it is conceded that no notice of the sickness was given. The Court instructed the jury upon this feature of the case as follows: 'The policy insures against loss by death, caused by sickness or accident; and any illness of such a character that no danger of death is thereby suggested to the assured as a reasonable man, is not the sickness or accident contemplated by this stipulation. But if this illness or accident is of such a character as to indicate to the assured, as a man of ordinary reason, that such illness or accident endangers the life of the animal, the stipulation under consideration would require notice of such sickness or accident to be given to the company or its agent.' In our opinion this direction to the jury was erroneous, when applied to the undisputed facts of the case. . . . It appears to us that under such a state of facts there was no question which the plaintiffs were entitled to have submitted to the jury. The provision of the policy under consideration is absolute. It is the contract which the parties made, and are required to perform, and it cannot be explained away or evaded by releasing one of the parties from the observance of its plain provisions."

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It is next insisted that the Insurance Company is estopped from making the defense that no notice was given of the injury that caused the animal's death, because, after the animal's death and upon notice to it thereof, it requested the plaintiff in error to make out proofs of loss, which he did, and the same were forwarded to the company and accepted by it.

We are of opinion that this did not amount to an estoppel. The only purpose of the proofs of loss was to give the company the facts pertaining to the mule's death, and it is entirely possible, while the record does not expressly so show, that it was from the facts disclosed by the proofs of loss that the Insurance Company learned that the provisions of the policy had not been complied with. The proof does show that it, immediately after receiving the proofs of loss, denied its liability, and refused to pay the claim.

We are of opinion that there is no error in the judgment, and it will be affirmed with costs.

Railway Co. v. Beatty

LEWISBURG & NORTHERN RAILWAY COMPANY v. T. J.
BEATTY ET AL.

Writ of certiorari denied by the Supreme Court at
Nashville, 1914.

1. RAILWAY CONSTRUCTION. *Independent contractor. Liability of company for acts thereof. When.*

A railway company which procures the grant of a right of way through the premises of a landowner in consideration of certain stipulations, one of which was that the railway company obligated itself to see that a well-known spring of the landowner was not injured by railway construction, is liable in damages for the impairment of the spring by reason of the work of construction, whether done by its servants or by an independent contractor.

2. SAME. *Consent of one joint tenant to deviation from contract or experimental work. Failure to plead.*

The contention that one tenant in common consented to a departure from the contract, or to experimentation, and thereby estopped himself and co-tenants from claiming damages for damaging a spring, will not avail a railway company having construction work done, for the double reason that it is no response to the demand of the non-consenting owners and because the matter of consent was not specially pleaded.

FROM MARSHALL COUNTY.

Appeal in error from the Circuit Court of Marshall County. JOHN E. RICHARDSON, Judge.

R. C. ARMSTRONG for Plaintiff in Error.

W. P. McCLURE and R. E. HAYNES for Defendants in Error.

Railway Co. v. Beatty.

JORDAN STOKES, SR., sitting as Special Judge instead of Presiding Justice Wilson during temporary disability of the latter, delivered the opinion of the Court.

THIS is an action for breach of contract brought in the Circuit Court of Marshall County by T. J., S. A. and E. A. Beatty against the Lewisburg & Northern Railroad Company, Leighton-Ambrose Construction Company and Maloney-Seymour Company. The declaration alleges that the Lewisburg & Northern Railroad Company is a railroad corporation engaged in constructing a railroad through Marshall County. Leighton-Ambrose Construction Company are the contractors for the construction of said railroad under contract with the corporation. Maloney-Seymour Company are sub-contractors under Leighton-Ambrose Construction Company.

The declaration sets out the contract that defendant in error had with the Lewisburg & Northern Railroad as follows:

"WHEREAS, Mrs. X. C. Beatty et als. have this day executed to the Lewisburg & Northern R. R. Co. deed for a right of way over and through their farm in the Fourth Civil District of Marshall County, Tennessee, said right of way being especially described in said deed, the same being here referred to.

"THEREFORE, in consideration of the above fact, the Lewisburg & Northern Railroad Company hereby agrees and binds itself to build and maintain a good and sufficient grade crossing over the road on said farm, which said railroad crosses, and the grade crossing is to be made at or near construction station 3350 plus 75, and said railroad company further agrees and binds itself to so construct its road as not to interfere with a spring on said farm, said spring being commonly known as Spout Spring."

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It is then alleged that the contract was breached and that the railroad in the construction of its road destroyed the spring referred to in the contract and it is sought to recover damages therefor.

The defendant, Lewisburg & Northern Railroad by plea admitted the execution of the contract sued on but denied its breach and insisted that if the spring had been destroyed it was done by persons who had no connection with the defendant, and that the destruction was not occasioned by the construction of its line of road through the Beatty land.

An amended declaration was filed to which a demurrer was interposed and certain steps taken which it is not necessary here to note for the reason that the case went to the jury alone upon the original declaration, and that action of the Court is not excepted to.

The Court also held that the contractors and sub-contractors were not liable and his action in that regard is not excepted to.

The question, therefore, for determination by this Court arises alone under the original declaration and the plea of the Lewisburg & Northern Railroad Company.

Judgment was rendered against the Lewisburg & Northern Railroad in favor of the three Beattys. The case is brought here by appeal in the nature of a writ of error.

Plaintiff in error has filed four assignments of error as follows:

"First: The Court erred in not sustaining defendant's motion for peremptory instructions in its favor at the close of plaintiff's proof.

"Second: The Court erred in not sustaining at the close of all the proof in the case plaintiffs in error's motion for peremptory instruction in its favor.

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"Third: There was no evidence to support the verdict of the jury in this case.

"Fourth: The Court erred in the construction of the contract sued on in this case and in instructing the jury peremptorily to find in favor of defendants in error."

It is not necessary to discuss seriatim each of these assignments. A disposition of the fourth assignment is conclusive of the case.

A brief statement of the facts is deemed necessary: On July 20, 1911, defendants in error, together with their mother who owned a life-estate in the real estate through which the railroad company proposed to construct its road, executed a deed conveying to the railroad a right of way through the property, and on the same date the Lewisburg & Northern Railroad Company executed and delivered to defendants in error and their mother, the life-tenant who has since died, the contract hereinbefore set out.

It appears from the proof that in the plans for the construction of the railroad no blasting was contemplated being done on the land of the Beattys. That the land was depressed and the roadbed would be elevated. Before the Railroad Company began work on the Beatty farm and before the right of way had been clearly and well defined, it became necessary for the sub-contractor to procure a certain kind of rock suitable for mixture with cement in the making of pillars. This sub-contractors approached defendants in error S. A. Beatty with a view of testing the rock on the Beatty farm to see if it was suitable. A test was made of such rocks some distance from the spring in question and was found not suitable. With the consent of S. A. Beatty a test was made by the sub-contractor of rock near the spring and it was found suitable for the purpose intended. An agreement was then reached between the

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sub-contractor and defendant in error S. A. Beatty under which the sub-contractor was permitted to get rock at a point near the spring, but the price to be paid for it was never definitely determined. The point selected by the sub-contractor was near the spring and near the right of way that had been conveyed to the railroad. The sub-contractor then approached the contractor and asked permission to get rock off of the right of way acquired by the railroad from defendants in error near the spring and near the place agreed upon with S. A. Beatty. The contractor gave his consent provided in making excavations the sub-contractor would again fill them up. This was agreed to and the sub-contractor began to make the necessary blasting for procuring rock. While this work was going on, the spring changed its location from on a bluff and came out at the bottom near the right of way of the railroad.

The trial Judge was of opinion that under the contract between the railroad and defendants in error, the railroad was liable for any damages that might be occasioned to the spring by anyone engaged in the construction of the road for plaintiff in error. This, it is insisted, was error for two reasons: First, that the sub-contractor, Maloney-Seymour Company, occupied the relation of independent contractor; and, second, that the blasting caused the damage to the spring was done on the land of defendants in error, and that two of them could not recover in this case for the reason that the work was done with the consent of one of the defendants in error and another, with knowledge that the work was being done that threatened the spring, made no opposition.

The construction given the contract by the trial Judge was right and proper. Under that contract the railroad bound itself and in no uncertain terms and without any conditions to so construct its road through the Beatty farm

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as not to interfere with or damage the spring. Under this contract, it matters not whether the road was constructed by the railroad or by contractors or sub-contractors. The contract obligated the railroad to safeguard the spring in the construction of its road, no matter how or by whom the road was constructed. This contract takes the case out of the doctrine of independent contractor, and it has no application to this case.

In answer to the second contention of plaintiff in error, we deem it only necessary to say there is no pleading raising such an issue. The question was neither raised by pleading nor by motion for a new trial, nor is it brought within the purview of any of the assignments of error filed in this Court.

As further answer to that contention, the proof is clear that the damage done to the spring was occasioned by blasting on the railroad's right of way and not on any portion of the land of defendants in error. There were sixty holes in all blasted. Fifty-four were on the railroad's right of way and six on the Beatty farm. These holes were arranged in the shape of a triangle with the point resting about the center of the railroad's right of way and are designated as series one, two, three, four, five, and six. The sixth series of holes was on the Beatty farm and the others on the railroad's right of way. Series one to five were all blasted before the sixth series. When the blasts in series No. 2 were discharged, water from the spring made its appearance in the excavations made by the blasting, and when the holes in series No. 6 were exploded, the spring had already become dry. It will thus be seen that the damage done to the spring was occasioned by the blasting of the sub-contractor on the right of way belonging to the Railroad Company.

The judgment of the lower Court is affirmed with cost.

City of Nashville v. Hager.

CITY OF NASHVILLE v. B. F. HAGER.

Writ of certiorari dismissed by Supreme Court at
Nashville, December, 1914.

1. MUNICIPAL CORPORATIONS. *Ordinances. Requisites.*

A municipal ordinance must not be violative of the Federal or the State Constitutions or of any statutes, and must not contravene any well-settled public policy or rule of the common law, except by express legislative grant; and must be uniform in operations, and reasonable, definite, consistent and capable of enforcement.

2. SAME. *Arbitrariness.*

And such ordinances must not make foolish or unreasonable distinctions, and must not be susceptible to suspension or application at the whim of the officials.

3. SAME.

An ordinance permitting wholesale producers to dispose of their products without license and without restriction, and at the same time taxing retailers and burdening them with conditions as to oath and bond, is unreasonable, in that there is no ground for making such distinction; and said ordinance is also void as denying to retailers the equal protection of the law.

4. SAME.

An ordinance restricting the privilege of selling farm and garden products to residents of Davidson County and denying the right of the citizens of any adjoining county or State to offer their products for sale is void because in violation of both the State and Federal Constitutions and unduly restrictive of trade.

5. SAME. *Taxing farmers. Peddlers.*

Farmers and gardeners who bring into a city the products of their farms and gardens for sale direct to consumers cannot be classed and taxed as peddlers. Nor can they be taxed in

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any way for the privilege of vending their produce. *Question reserved*: Whether a city can tax farmers and gardeners a small sum as a police regulation only?

6. *SAME. Restricting sales to residents as a police measure.*

Assuming but without deciding that municipal corporations can as a health measure restrict the privilege of selling produce to county residents, an ordinance dealing with the subject must conform to the requirement that it must be uniform and free from arbitrary classifications; and further, it must conform to the requirements of due process of law and equal protection of the law. An ordinance prohibiting the selling of any and all products by non-residents is unreasonable, granting the city might have prohibited the offering for sale of meats brought from long distances.

7. *SAME.*

An ordinance which subjects the citizen while following his lawful pursuit to the whim or caprice of a city official is unreasonable and void.

8. *SAME. Forestalling and regrating.*

A municipal corporation may, when so empowered by charter, pass ordinances prohibiting forestalling and regrating. But such ordinances must bear this intent upon their face, and must be uniform in operation and reasonable in provision.

9. *POLICE POWER. Estoppel or granting. Prescription.*

Neither by grant nor prescription nor by acquiescence can a city be held estopped to exert in a reasonable way its police power with respect to places and property within its borders.

10. *SAME.*

While the police power cannot be contracted away nor lost, and cannot be defined, it must be exercised with the principles of due process of law and equal protection of the laws in view; and an ordinance capriciously dealing with matters properly the subject of the police power cannot be sustained.

11. *CONTROL OF STREETS.*

The streets of a city are held in trust by the officials, and it is the duty of the officials to keep them ordinarily free from obstructions and to prevent encroachments. But the streets may

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under certain conditions be used in a limited way for commercial transactions. Nor does the rule requiring restriction of streets to traveling purposes only apply in full force to squares or places by common consent allotted to the people as meeting places for barter and exchange, provided of course that part used or needed for travel be not unduly impeded.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

A. G. EWING and F. M. GARARD for Plaintiff in Error.

HARRY STOKES and T. T. McARLEY for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

DURING the year 1913 the lawmaking body of the City of Nashville passed the ordinance which is hereinbelow copied:

"SECTION 1. That for the purpose of regulating the rights of producers to vend their products upon the Public Square, it shall hereafter be lawful for the producers of farm products to occupy such portion of the Public Square as may be designated by the proper authority, through the Market Master or other police officer, with wagons or other vehicles, from 5 o'clock P.M. until 9 o'clock A.M., the following day (except on Saturday, when the time shall be extended until 10 o'clock A.M., and provided teams are removed, for the purpose of selling or exposing for sale at wholesale only, any vegetables, pro-

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duce, fruits, meats, or any other eatables raised or produced by such producers shall not be required to pay any privilege tax to the City of Nashville. Any such producers desiring to sell at retail or to consumers upon the Public Square, during the hours above specified only shall, before doing so, first make an affidavit that he is a resident of Davidson County, and that he will sell or offer for sale any goods or articles other than raised or produced by him or her. Said affidavit shall be sworn to before the Secretary of Commissioners, who shall thereupon issue a certificate to the City Comptroller and Treasurer, which shall be their authority to issue to such producer a privilege license for which shall be charged the sum of \$20.00 per year, payable semi-annually, on the first day of March and the first day of September, respectively, in the Revenue Office. Anyone selling or offering for sale any articles or produce upon the Public Square in violation of this section shall be deemed guilty of a misdemeanor and shall be arrested and fined by the Judge of the City Court not less than five dollars, nor more than twenty-five dollars, and each sale or attempt of sale shall constitute a separate and distinct offense.

"SEC. 2. *Be it further enacted*, That it shall be unlawful for non-producers, hucksters or peddlers to sell or offer for sale their wares upon the Public Square at any time, and anyone violating the provisions of this section shall be subject to the same penalties as provided in section 1 of this ordinance; provided, however, that merchants, hucksters or other non-producers may be allowed to occupy said Public Square with their wagons or vehicles at a reasonable time within the discretion of the Market Master or officer in charge of the Market House or Public Square, while engaged in purchasing supplies

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or produce from stall renters within the Market House and from county producers on the Public Square.

SEC. 3. *Be it further enacted*, That it shall be unlawful for stall renters within the Market House to use that portion of the Public Square immediately adjacent to the north, east and west side of the Market House from 5 o'clock P.M. until 12 o'clock noon the following day (except Saturdays, when the time shall be extended until 10 o'clock P.M.), for the purpose of receiving and delivering their wares, but otherwise than herein specified, the provisions of the preceding sections shall apply to stall renters the same as to all others.

"SECS. 4 and 5. Provide for repealing conflicting ordinances and prescribe time of taking effect of the present ordinance."

On the 20th day of February, 1914, Hager was arrested upon the Public Square in Nashville, for and while violating the first and second sections of the above regulation. He was taken before the City Judge and fined. He appealed his case to the First Circuit Court, where it was tried by the Hon. Thos. E. Matthews upon an agreed statement of facts. The Circuit Judge held this ordinance invalid for many reasons set out by him in an opinion evincing much learning and research. The city excepted to the judgment and has appealed in error to this Court.

This interesting case was presented to us by able counsel in very strong arguments made orally and in writing; and the discussion took a wide range.

We were earnestly requested to enter upon an extended discussion of the respective rights of the City Council and of the truck growers to the use of the Public Square for marketing purposes. The desire of the city officials, expressed through counsel, was to know exactly what their

rights, duties and powers with respect to this section of the city were; and it was the earnest wish of counsel for defendant in error and the large class of whom the defendant in error is a representative, that the privileges of himself and those of like situation with respect to this public area should be defined in such way as to protect them from future annoyance or interference.

Learned counsel for the moment forget that Courts are constituted to decide controversies and not to advise legislative bodies. In Tennessee especially are the Courts restricted in their functions to a decision of controversies; that they act *post factum* only, and can never be called upon to prescribe in advance what lawmaking bodies shall do or in what way parties in future shall conduct their transactions in general. Whenever they do so, they lay themselves liable to the imputation of impertinence, especially when questions involving the ever-changing and broadening police power of a great State or a progressive city are under consideration. It is wisest that we in the main adhere to the practice of deciding such questions only as arise from the facts presented to us and to bear it in mind that when we step beyond the facts and undertake to adjudge something about which there is no jural clash we are deciding something as men and not as judges. Points not called for by the facts cannot and do not have the authority and dignity of an adjudicated question as happily expressed by the French jurists, and any attempt at solution will but embarrass Courts, lawyers and litigants in future.

Nevertheless, it is impossible for a Judge to elaborate upon questions of law arising upon a record without giving expression to general propositions and without to some extent dealing with jural matters in theory. Hence, there may be found in this opinion some propositions which, al-

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though not necessarily growing out of the matters in controversy, are yet suggested by the points involved to such degree as to warrant their exposition as rules of law to be accepted in this jurisdiction for the time being.

This opinion could be extended to great length by heaping together diverse scraps of history of markets and marketing. It has been the subject of legislation and of judicial decision or of police regulation almost since the dawn of civilization. It is especially true of Aryan and Anglo-Saxon peoples that this subject has engrossed the attention of lawmakers, whether in the halls of legislation or on the bench. See Sir Henry Maines' *Early History of Institutions and Village Communities*, Adam Smith's *Wealth of Nations*, Keary's *Dawn of Civilization*, Sullivan's *Markets for the People*, and the *Tracks of Life* by L. G. Sera. From these authorities the very seed-principles from which juristic relations of producer and consumer are derived; and they should persist and be observed in the most artificial stages of society.

By recurrence to the jurists, publicists and historians whose names have been given, and by examining the law books of England and this country covering two or three centuries, the reader will be convinced that this is not a new controversy. Time and time again the regulations of markets at the request of the inhabitants of a city as against and in contravention of the wishes of the producers have been demanded and have been enacted. With respect to the case at bar, it is not unreasonable to assume that the City Council were actuated by a desire to comply with the wishes of a large body of the inhabitants and to give expression to the city public opinion at the time. If so, the officials need not be denounced as unjust or tyrannical. But unfortunately the inhabitants of municipalities who demand these regulations, and the officials who respond

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thereto, do not always have the proper viewpoint or perspective. This can be gotten in no other way than by the historical and descriptive method, which is seldom at hand or in the minds of the draftsman of such measures. The relations between the country producer and the city consumer should be most amicable, but this feeling can be preserved only by a due regard each for the other and each for all. L. G. Sera, to whom reference has been made, presents a luminous idea which dwellers of the cities should not overlook; namely, that one of the implied promises or conditions of the worker leaving the walls or confines of the city and going into the country and tilling the soil is that the city man will purchase the country man's products without undue restraint or burden. A thought imparted by Keary is that the city man may designate particular places in the municipality to which the countryman must bring his produce for sale, provided egress and ingress be free and unhampered.

It does not necessarily follow, because city lawmakers are actuated by the best of motives and that they conceive themselves as putting into operation their undoubted police power, that any measure which may come from them must be accepted as good and binding. In truth, the motive of lawmakers are negligible when Courts are asked to pass upon the validity of a regulation. Hence, we could with propriety dispense with any presumption of or inquiry into the good or bad motives of the City Council of Nashville when they passed the measure assailed here. How laudable soever may have been their intentions, if their regulation violates the Constitution or contravenes natural rights, or is lacking in those requirements which must be found in city ordinances, it must be discarded. In the language of Hegel, there may be objective wrong without subjective injustice; an act or a measure may in

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its results or operations be manifestly unjust and illegal without the accompanying design or intention of bringing about anything unjust or illegal. The common law fiction of conclusively presuming that reasonable men intend the ordinary and natural consequences of their acts has for ages served the beneficent end of making questions justiciable. This simply means that the Courts are more concerned with the deeds of men than with their wills and intentions.

It is not requisite that we elaborate upon the agreed statement of facts, nor that we set out in *extenso* the numerous points of criticism of the measure under consideration. With respect to the latter, it will suffice to say that learned counsel have assailed the order from almost every conceivable legal rampart. With respect to the facts, it is sufficient that we say that Hager was arrested while selling butter and eggs upon the Public Square in Nashville by retail without having taken an oath and having procured a license as prescribed in section 1. It was further admitted that he and his associates had raised those products upon their farms in Davidson county and had for years been bringing them to the Public Square in their wagons and offering them for sale at wholesale and retail. It was admitted that the producers of Davidson and adjoining counties had for probably half a century pursued the course which Hager was following at the time of his arrest. While not expressly shown, we have assumed for the purposes of this litigation that Hager and his associates had purchased products from other farmers in counties in Tennessee and Kentucky and had brought them to the Square and exposed them to sale.

The presumption is that all city regulations are valid, and that it is incumbent upon those who assail them to show in what respect they are fatally defective. It is likewise

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sound that ordinances passed pursuant to express legislative grants cannot be adjudged void because they do not square in all respects with refined reasoning in their purport and provisions. But ordinances passed pursuant to explicit legislative grant must be reasonable to a common intent, as Lord Coke frequently remarks; and they must also comport with certain requirements which the Courts have from time immemorial said must be found in these miniature legislative regulations, to the end of keeping the citizen above the tyrannical exercise of municipal power. Ordinances must not violate either the State or the Federal Constitution nor any statute of the State, nor must they contravene well-established common law rules or the dictates of public policy of the State; they must be reasonably certain in their provisions and uniform in operation, and not subject to the discretion of any particular official and must not make arbitrary divisions or classifications or unwarranted distinctions among citizens: *Jones v. Nashville*, 109 Tenn., 560. Can the ordinance under investigation withstand the assaults made upon it by counsel representing Hager?

We are convinced after a most careful, thoughtful and painstaking inquiry made with the delicacy of the situation always in mind that the first section at least cannot receive judicial sanction, and we shall proceed to set forth some of the reasons which drive us irresistibly to this decision.

A vulnerable point appears in the first sentence; namely, that part wherein some official of the city is clothed with power and authority to designate where the wagon or wagons of any and all produce sellers may be stationed in or about the Square. The farmer occupying a position one day may be required to take another one on the succeeding day; or, having taken the position at one hour,

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may be required to move to another place before he disposes of his store of produce. Again, a reasonable interpretation of this ordinance would require the producer to seek out the city official and find the spot at which he may stop his wagon. A number of other inconveniences, burdens, uncertainties and extra precautions and extraordinary diligence to comply with the wishes of the officer so as to avoid controversy, could be imagined as clearly within the possibilities of the situation imposed by that first sentence. In other words, the seller is restrained of his liberty and his freedom of action is impaired to an extent which neither justice nor reason can sanction. It is no answer to say that the city yields the producer a privilege which it may entirely take away from him. Having undertaken to concede the producer some sort of right to this public space, the city cannot hedge it about with arbitrary and unwarranted qualifications and limitations, nor can it unduly restrict a privilege which it has acknowledged to exist. An ordinance which vests any official with a discretionary power such as will subject the citizen to the whim and caprice of the officer at different times is contrary to the genius of our institutions and should not be given recognition as a valid regulation whether it emanate from the police power or otherwise: *Newbern v. McCann*, 21 Pickle, 159.

The next point of criticism that occurs to us is that the City Council divides producers into the two classes of wholesalers and retailers without any substantial reason for making the distinction. With reference to the inconvenience to the citizens of Nashville, and the endeavor of the city lawmakers to mitigate what they for the time being considered an objectionable use of the Square and the streets of the city, it suffices to say that there will result just as much annoyance, disorder, interference and obstruc-

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tion from the toleration of wholesale producers as from retailers. A man stationed upon the Public Square engaged in dispensing his products by wholesale cannot be regarded as any more of a nuisance than is his neighbor who is offering his goods at retail; nor does it require any more police supervision to control the persons, teams and wagons of wholesalers than of retailers. Hence, there is no satisfactory basis for this distinction. Again, assuming that the city might divide the producers coming upon the Public Square into wholesalers and retailers, it must do so with a measure which is reasonably certain and capable of comprehension and enforcement. It must be certain to a common intent from the standpoint of those who are expected to obey its commands. This provision is entirely silent as to the methods of ascertaining who is a wholesaler. It does not define the quantity which he must sell at any one time, nor the persons with whom he must treat. Nor is the consumer given any means or afforded any *indicia* by which he can determine when he goes upon the Square to make his purchases whether he is approaching a wholesaler or a retailer. If this is an enforceable regulation, then the wholesaler violates its provisions by selling at retail. One definition of a wholesaler accepted the world over is that of a man who sells in bulk to another who intends to re-vend the articles purchased. In order to comply with this regulation, the wholesaler would be onerated with the duty of inquiring of the purchaser whether he was a retailer or intended to re-sell, and it would exact of the purchaser and consumer the duty of ascertaining whether the vendor is a wholesaler or a retailer.

This measure in the respect under consideration is inconsistent, unreasonable and lacking in uniformity of operation and makes arbitrary distinctions and requires unusual acts upon the part of those whom it may affect.

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We feel constrained to announce that this measure is void from almost any view that may be taken of it.

The time limitation in this ordinance is not reasonable nor just from the standpoint of the producer, especially when considered in connection with the long-time custom of the farmer to drive upon the Public Square at any time which may suit his convenience. The city, by not taking away the right of the producer to dispose of his articles upon the Public Square, concedes that he may do so. The question is whether he may be restricted to hours between the closing of the day and the rising of the sun on the succeeding day in which to go upon this public space and expose his products to sale. From the standpoint of many, it might be very well for all producers to be barred from the Public Square at all other times than those prescribed by this ordinance, but this must not be considered the exclusive test of its validity. The record does not disclose any satisfactory reason why the producer should not during some time preceding 5 o'clock in the afternoon drive upon the Public Square and have a transaction with the purchaser who is seeking products for immediate consumption. No reason is shown why he might not halt upon this public space and dispose of some of the load which he has brought to the city. And yet, if we give to the ordinance under investigation that interpretation which its words demand or imply, no producer can stop upon the Public Square for any moment during the forbidden time and make a sale of the produce of his farm. We do not believe this can receive the sanction of the judicial department of the State. At all events, these rights must not be yielded except upon the clearest and most unmistakable demands of the police power of the State or of the city.

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We must not be understood as announcing that the city can never make reasonable regulations with respect to hours of sale and methods of sale. We are bound to recognize that, regardless of the length of time the farmers may have used the Public Square, whether by prescription or contract. the city is never shorn of its police power, a power which can never be defined or delimited: *Samuels v. Nashville*, 3 Sneed, 298; *Chattanooga v. R. R.*, 128 Tenn., 400. The point that we adjudge now is that the city authorities in undertaking to prescribe a regulation have acted arbitrarily and unreasonably in fixing time and place. Even the police power must be exerted in subordination to the due process and equal rights requirements.

Turning to that portion of this ordinance which has reference to producers whom the city officials choose to denominate retailers, we respond that its validity can be successfully challenged upon more than one ground. In fact, its vulnerable features are patent and numerous. Its predominant defect is the effort by the legislative body to deny access to the Public Square to every one who refuses to swear that he is a resident of Davidson County, and that he will not expose for sale any articles other than those produced by *him*. The unavoidable consequence of this provision is to deny to the farmer or producer of any other county in Tennessee or of any adjoining State the right to bring his produce to the Public Square and offer it for sale. The city fathers can under no conceivable situation and for no imaginable reason inaugurate such regulation for any market or for any space within the city wherein producers are permitted to vend their articles. This measure violates both the Federal and the State Constitutions and is contrary to our public policy. It likewise contravenes the privileges of the city consumer and un-

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warrantably restricts him in the selection of persons with whom to deal. It is in the teeth of the declared policy of the nation and the State that the markets shall be free and open to everyone and that there shall be no discrimination with respect to domestic and foreign dealers or producers: *Nashville v. Althrop*, 5 Coldwell, 544; *Com. v. Snyder*, 182 Pa. St., 630, a case directly and luminously in point; 21 Cyc., 365. See likewise the following authorities which have been examined by us: *Lucas v. McComb*, 49 Ill. App., 60; *Grafty v. Rushbill*, 57 Am. Rep., 128; *Re Jarvis*, 66 Kansas, 329; *Rash v. Halloway*, 82 Ky., 674; *Com. v. Hannah*, 195 Mass., 262; *Sayre v. Phillips*, 16 L. R. A., 49; *Com. v. Simmons*, 15 Pa. Ct. Co., 550.

Again, this provision in terms prohibits any man, with or without license, from selling produce on the Public Square as agent of another, nor can any partnership or corporation vend its articles through an agent, nor, as we interpret this ordinance, can a joint stock company or an association send its products into the city through a representative or agent and offer them for sale. Again, as we interpret this measure, no man can stop upon the Public Square for five minutes and offer his products for sale unless he has taken the oath not to sell and has paid a license fee.

It is said that the city is making no effort by this ordinance to deny producers the right to sell their articles at other places within the city limits, and that no effort is being made to control the market or to confine dealers to any one spot, or to force producers to transact their business within the walls of the Market House. This may be true, and may be accepted as such, and this renders it unnecessary for us to determine whether the city under the charter power to establish and regulate markets may exclude all others than those who come in to the desig-

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nated building or go to a specific spot; and we are likewise relieved of the necessity of deciding whether the city can prohibit sales except at established markets. We are now simply concerned with the question as to whether the effort made by the city to restrict marketing is reasonable, uniform and without arbitrary distinctions.

Again, it is claimed that that provision restricting sales to local dealers and producers is a valid police regulation, because the officials can with such a measure prohibit the bringing into the city of produce that has been hauled long distances and exposed to sun, wind and dust; and the case of *New Orleans v. Stafford*, 21 Am. Rep., 565, is cited as juridical warrant for such a measure. We can conceive of a regulation with reference to meats and delicacies which would be reasonable and as coming properly under the police power. But unfortunately for the city, the ordinance in question makes no such distinction. It excludes corn, wheat, eggs, chickens, potatoes and countless other products of the farm which do not deteriorate for days or weeks, and are not injured from transportation for hundreds of miles.

It is earnestly contended by counsel for Hager that the imposition of this privilege tax was violative of that provision of the Constitution of Tennessee which prohibits the levying of any tax upon the products of the soil of this State either in the hands of the producer or his immediate vendee. This is a serious question. There can be no doubt but that if the imposition provided by this ordinance be treated as a tax upon the produce of the farm, it was and is violative of the Constitution. There can be but one side to this question; but as it does not clearly appear that the imposition of a license is a tax rather than a police requirement, we cannot hold it to be a tax burden not authorized by the Constitution. At least, we refrain

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from announcing such conclusion, in view of the universally known distinction between a privilege tax for revenue purposes and a license fee for purely regulative and police purposes. We are rather of the opinion that the Constitution of Tennessee is so emphatic as to deprive the Legislature and all municipalities of the power to tax the farmer with any sum for his privilege of selling the products of his farm. We are inclined to the view that if the framers of the Constitution had intended for legislative bodies to exact of the tiller of the soil the payment of a fee of the most insignificant amount as a condition precedent to his right to sell, they would have annexed to the constitutional exemption a proviso that inspection fees might be exacted; and we are convinced that the predominant and pervading spirit of the Constitution prohibits the exaction of any sum from the farmer for the privilege of bringing the fruits of the soil to the hungry consumer of the city. A statute or ordinance may be declared unconstitutional because violative of the spirit of the Constitution equally as if in contravention of the words or paragraphs thereof: *Stratton v. Morris*, 5 Pickle, 497.

It must not be forgotten that the power to tax is a power to destroy, and that if the framers of the Constitution have unmistakably said that a certain species of property should not be taxed, a limited power under the guise of a police regulation should be conceded only in extreme cases, if at all. Again, the occupation of farming has never been classed as a privilege that was taxable, and it would be absurd to advance such proposition in view of the absolute dependence of the whole of society upon the tillers of the soil. For this reason we say that to tax or burden the farmer with a license fee as the condition of selling his products is the taxing of the business of farming: 1 R. C. L., 789; 15 Am. & Eng. Ency. of Law,

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1584; *Re Snyder*, 68 L. R. A., 712. But we reiterate that we recognize the existence of that broad, undefinable and almost illimitable police power residing in States and in municipal bodies, and that in the exertion of this authority the lawmaking body may resort to a license fee as a regulative measure and a tax upon the occupation only and not upon property. We therefore refrain from determining whether or not a municipality is absolutely prohibited from requiring farmers to pay a license fee for regulative or health purposes only. We feel that this is a question which the Courts for the time being must leave unadjudicated. But we must not be understood as yielding to the insistence that this power clearly belongs to the city.

We pause to remark that the case of *Kurtz v. State*, 2 Pickle, 159, is not exactly in point, for the reason that the Court in deciding that case was dealing with the right to tax manufacturers for exercise of the privilege of selling. There is a marked difference between the Constitutional exemption accorded to manufacturers and the one provided for tillers of the soil.

Counsel for plaintiff in error insist that this ordinance should be sustained under the common law, statutory and charter power and duty of the city officials to regulate and control the streets of the city. Authorities sustaining the proposition that the officers are trustees of the citizens with respect to streets and that the officials cannot grant to individuals rights which are inconsistent with the use of the streets as travelways and means of ingress and egress are brought to our attention. In the abstract, these statements of the rule are sound, and if we were dealing with the portion of a street that is undoubtedly used for the purposes hereinabove indicated, the propositions would be more appropriate. The record is silent as to whether the space desired by the produce dealers is needed for purposes

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of travel or whether it can reasonably and conveniently be allotted to the gregating instinct and customs of the people. We are dealing with a public square, a space which should be referred to more as an institution than as an area. The squares of county seats in which court houses are situated have for more than a century been used as the meeting place of the producer and the purchaser, the buyer and the seller, the trader and the inspector. By common consent these open spaces in towns have as it were been set apart and used for various and sundry inter-communications of the people in and surrounding county seats, and have almost become fixtures or institutions in the communal life of America and especially of the South. It is difficult to conceive of the use of the Square for the purpose of negotiating a small commercial transaction as being a diversion of the streets to other ends than those designed. But in this connection, and for the purpose of preventing our language being treated as an authoritative declaration of the rights of the public to the use of the Square in question for trading, etc., we reiterate the statement hereinabove made that no length of time will vest the people with any right to this space entirely removed from the police power of the city and of the State.

Again, conceding that the officials of a city are in duty bound to clear the streets and to prevent encroachments thereon and remove obstructions, this measure does not in any sense undertake to do so. It yields to the producer and the consumer the use of the Public Square as a meeting place at certain times and under peculiar regulations. The city itself is then in the position of doing that thing which it now insists it was powerless to grant or to do. But, conceding that it has the power to control the streets absolutely and that a limited control is included in the broader power, this ordinance is not a reasonable and con-

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sistent one as a measure of limited control. Hence, it must be adjudged void even if the clearest power to control the same is vested in the city.

Recurring to the testing of the ordinance under consideration, we desire to mention two or three other reasons why it must be pronounced an invalid regulation, regardless of the motives actuating its passage and regardless of any charter or common law power to which it may be referred. It will be noted that wholesalers are permitted to vend their wares whether raised in Davidson County or elsewhere and without requiring any affidavit as to citizenship or the production of the articles sold by them. This is a yielding to wholesalers of rights which are in the subsequent portion of section 1 denied to retailers, without any reason or any basis in the world for the distinction. Again, it will be seen that wholesalers may make sale of their products upon the Public Square without paying any license fee, whereas retailers are burdened with this tax. As we have said heretofore, there is no well-founded difference between the wholesaler as a nuisance and the retailer as such. If they occupy the same plane, then the burdening of the retailer with a tax is a denial of the equal protection of the laws, a bringing about of inequality of right and the injecting of discriminations without any real difference. We wish to remark also in this connection that that part of the section referring to retailers inevitably operates to restrict the market of the consumer and to enhance the trade of the merchant and stall occupant of the city, whether so intended by the officials or not; and this is an additional reason for looking with disfavor upon this regulation in its application to the bona fide tillers of the soil: *Caldwell v. Alton*, 85 Am. Dec., 282; *Tigert v. Detroit*, 38 N. W., 714; *Watts v. Western*, 62 Fed. Rep., 1036. As a matter of fact, a measure of this kind,

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that is, a regulation whose inevitable tendency is to create a monopoly in a certain class of citizens in or about a certain place, is contrary to the bill of rights embodied in the Constitution of the State of Tennessee, and we need not travel beyond this jurisdiction for authorities.

Other reasons for the invalidity of section 1 could be enumerated, but we deem those which have been set down as sufficient to demonstrate its soundness. We pass now to the second section. We were at first under the impression that this portion of the ordinance could be separated from the other sections and at least partially sustained. We have, however, reached the conclusion that it will also have to be pronounced void for a few reasons which will be briefly stated.

Our first proposition is that this section was a part and parcel of the scheme set forth by the first section, and that the intention was that the two should be linked as aiding one and the other and as effectuating the design of the city to regulate the use of the Public Square as a market place. There is a distinct reference to one of the classes contemplated in the first section, and this is sufficient to make it a necessary part of the legislative scheme or arrangement. If this be so, then the second section must fail along with the first one. But there are some additional reasons why this second section independently will have to go in our judgment. A palpable result from the enforcement of this regulation will be the restriction of trade and an enlargement of the traffic of stall renters in the city Market House. This is one of the taints of the measure. Again, there is an inconsistency between the second section and the first which makes it difficult or almost impossible to observe its directions without embroiling the county producers in violations of the first section. Or, if the section be taken according to its phraseology, the

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parties at whom its animadversions are directed are absolutely restricted to the purchasing of their supplies from stall renters or else staying off the Square entirely. The foundation for these propositions is seen in that provision of the second section which prohibits non-producers, hucksters and peddlers from being on the Square at all except to purchase supplies from *county producers*. A man may be a wholesaler whether he lives in Davidson County or not; and yet the second section grants leave to the non-producer and peddler to come on the Square and negotiate with country producers only. But we pass to another reason. It will be noted that non-producers, merchants and hucksters are given permission to halt upon the Public Square and make purchases from the parties hereinabove enumerated, for a reasonable time, to be determined *by and in the discretion* of the official of the city having in charge the Market House or Public Square of the city. We see here another provision which subjects the citizen to the uncontrolled power of some official whom the city stations in this territory for the purpose of supervision and direction. In other words, the non-producer, merchant or huckster may go upon the Public Square for the purpose of making purchases, provided he approach in such manner and leave at such times and in such manner as shall seem to the city official to be proper and fitting. This is an unreasonable provision and an unwarranted invasion of private and public right, and an unjustifiable abridging of the privileges of the citizen without appreciable public benefit. We are of opinion that this cannot be done without express or necessarily implied statutory authority, and that the effort to do so in this section is a nullity. We deem it unnecessary, and we say this by way of reiteration, to determine the exact extent to which the rights of the people of the county with

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respect to the Square will exclude the control thereof by the city, nor shall we, as we have said, undertake to define the rights of the city to control and regulate this space. This is undoubtedly a subject which must be dealt with by the Legislature of the State directly or by specific delegation of power to the municipality of Nashville.

Learned counsel for the city insist that the second section was passed pursuant to that charter section vesting the City Commissioners with the right to control and establish markets and to prevent forestalling and regrating. If this section had been drafted for the purpose of carrying into effect the power to prohibit forestalling and regrating, and had been drafted with the rules of reasonableness and consistency in view, it would undoubtedly have been treated as a valid measure. The City Commissioners were clearly vested with the right to prohibit forestalling and regrating, and while these terms are in these days of commercialism rather antiquated and vaguely used, they have a common law meaning; and ordinances effectuating them may be passed by the municipality of Nashville. But the effort here made is intertwined with many other designs or desires which must render the whole thing nugatory. The ordinance does not define forestalling or regrating, nor does it on its face or by any sort of reasonable construction deal with these common law offenses. Hucksters and merchants are not forestallers and regraters in the sense of the law. They may purchase from wholesalers without being guilty of any statutory or common law offense. In fact, they may purchase from so-called retailers, provided they do not intend to re-sell goods upon the market upon which they made their purchases. And yet, this section restrains all non-producers, good or bad, lawful or unlawful, from approaching producers upon the Public Square except under annoying and vexatious circumstances.

Forestalling is defined as the offense of intercepting producers on their way to the market or accosting them while preparing to go to the market and buying their provisions for the purpose of bringing them into the market to which they were destined by the producers. Regrating is the buying of provisions in a market with the intention of reselling them in the same market at a higher price. The draftsman may have had this class in mind, but he did not reach them. We would have to give this measure an unwarranted construction to say that it excepts from its operation those who are not forestalling or regrating. As we have said, the city might prohibit hucksters and peddlers from selling in the markets of the city, including possibly the Public Square: *Knoxville v. Dutton*, 13 Cates, 25. And this although hucksters and peddlers are licensed by the Revenue Act of the State. This is held by our Court to be one means of preventing forestalling and regrating and that municipalities may pass such regulations. But an ordinance aimed at these practices must be definite, reasonable and capable of enforcement. The section under consideration embraces features which we think destroy it as a police measure. The subject of forestalling and regrating takes us back to periods of English history dating from Richard II down to James II, during which time countless statutes denouncing the practices were passed. But not one of these ancient regulations, many of which we have read, condemned the honest buying of produce in large quantities with the intention of carrying them to a market and re-selling at a reasonable profit.

It must be remembered that we are not dealing with the right of the city to prevent or regulate peddling. This is a police power belonging to all cities. One of the advantages is the protection of the citizen against imposition by irresponsible and unattached persons. It is some-

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times true that the best interests of the citizens can sometimes be subserved by restricting the selling of articles to known dealers: *Com. v. Harmel*, 27 L. R. A., 388. But farmers are never classed as peddlers nor as hawkers and must not be so classified or contemplated by the draftsman of any city regulations: *idem*. So that the section under consideration cannot be justified under this phase of the police power. But even with respect to the selling of produce upon the streets by peddlers, the officials of a city should act with exceeding caution, remembering that it is their duty to regard the interests of the vast concourse of consumers, whose advantage it is to secure provisions at low prices rather than that merchants and stall renters should profit. But conceding the power of a city to deal with non-producers and hucksters, we are of opinion that the city in this instance unduly and unreasonably hampered the rights and privileges of the citizen, and that the whole scheme must be declared invalid.

As Hager is not within the class at which the third section is directed we decline to pass upon its validity. Those only who are affected by a statute or an ordinance can assail it in the forum.

It results from the foregoing that the judgment of the Circuit Court discharging defendant from custody must be affirmed.

In final response to the contention that the city officials were actuated by the best and fairest of motives, we reiterate our statement that we are dealing with necessary consequences and with discriminations lacking in reason, equity and uniformity. Such results invalidate measures regardless of the motives of their enactment.

Another observation or two before concluding. This controversy is an illustration of the fact that lawmakers at times try to bridge too great a chasm among peoples

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by hastily contrived methods. It must not be forgotten that among most peoples law is a growth, an unfoldment having its roots in instinct, habit and custom. Legislators must not ignore this nor overlook the historical development of the law, nor forget that customs long observed cannot be quickly effaced.

Another remark or observation may not be amiss. The doctrine of *sic utero tuo ut non alienum laedere* found expression in the civil law more than two thousand years ago. It was imported into the common law as a maxim some time back. It is alive today and is an illuminating principle which may be resorted to for the determination of disagreements such as are disclosed by this record. A refinement of this principle, possible of attainment, is that men, whether individually or as a class, or in the aggregate, must not use their persons nor property nor follow their pursuits so as to annoy or offend others. But this maxim, when its application would run counter to long-observed habits and customs of a people, must be put into operation by wise measures and by time and forewarning. People who have followed for scores of years a certain course as a matter of right may be taught that another way is better and less annoying, but a readjustment along new jural lines cannot be brought about suddenly. It must be remembered that customs and laws are a growth and not a manufacture, and that rude changes must not be attempted.

Railway & Light Co. v. Rogers.

KNOXVILLE RAILWAY & LIGHT COMPANY VS. RUTH
ROGERS.

Affirmed by the Supreme Court, 1914.

1. CARRIER AND PASSENGER. *Street railway. Duty of conductor while passenger is alighting.*

It is the duty of the conductor of a street car to see or to know that alighting passengers are in the act of disembarking; and it is no excuse or defense that he did not see them before starting his car.

2. EVIDENCE. *Hearsay. Advice of physician.*

It is competent for an injured plaintiff whose behavior subsequent to the accident is charged to have been negligent to state or prove that she received advice from competent physicians with respect to her conduct, and that she followed their suggestions.

3. GAMBLING VERDICT. *When not.*

A verdict, the amount of which is approximately the sum arrived at by dividing the aggregate estimates and wishes of the jurors by twelve, is not a gambling verdict if it be shown that there was no antecedent agreement to abide the result, especially if the amount arrived at by this method is adopted after subsequent thorough discussion.

4. NEW TRIAL. *Motion for. Amendment.*

A motion for a new trial may be amended more than thirty days after verdict returned.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

Railway & Light Co. v. Rogers.

L. D. SMITH for Plaintiff in Error.

J. A. FOWLER AND HARLEY FOWLER for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Suit by Miss Rogers for personal injuries received while attempting to alight from a car on which she was a passenger. In her declaration and evidence she clearly presented and developed a case of a passenger who signals for the car to stop and prepares to alight and is thrown from the car by the sudden starting thereof at the command of the conductor. Verdict and judgment were for \$7,500.00 The Railway Company has appealed and assigned numerous errors.

That Miss Rogers presented and showed by material evidence a right of recovery cannot be controverted: *Street Railway v. Shaw*, 110 Tenn., 467. In fact, the evidence is all one way that she received her injuries while attempting to get off a car at a regular stopping place before sufficient time had elapsed for her to alight, or that the car was started while she was in the act of disembarking. The duty of plaintiff in error to have known of her actions at the time was absolute. It will not suffice for the conductor to state that he was not aware that she was in the act of leaving the car when he gave the order to the motorman to move one. It was his duty to have known this as a certainty before giving the signal.

What we have just said with respect to all the evidence being substantially one way disposes of the second assignment of error, predicated as it is upon an instruction of the Court that Miss Rogers would not be guilty of contributory negligence in stepping from a moving car if the

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Company had failed to give sufficient time to alight, and thus put her to the election of stepping off or being carried beyond her station. It is contended that she should have waited for the next street corner. Waiving the question as to what a passenger should do in such case, we dispose of the contention by stating that there was no evidence tending to show such situation, and that the theory of plaintiff in error had no basis of fact. Hence, the instruction was an abstraction and therefore harmless. We overrule the second assignment of error.

The 3rd and 4th assignments of error may be treated together. The 3rd one is in substance that the Court erroneously instructed the jury that Miss Rogers would not be responsible for the aggravation of her injuries by pursuing her vocation of teaching dancing after her fall if she exercised ordinary care in seeking and following the advice of reputable physicians and surgeons. The predicate of the 4th assignment is that the Court admitted testimony of Miss Rogers to the effect that she had been advised by various physicians and surgeons after her injury that she might safely follow her profession and that it would not aggravate her condition, defendant in error being permitted to repeat to the jury the advice which the medical men had given her.

We have been unable to discover any substantial reason why this testimony should not have been admitted and why the trial Judge should not have so instructed the jury. No case directly in point was brought to our attention, and we have been unable after diligent search to find authorities of that nature. At the same time, the decisions with respect to the duty of an injured person to exercise due care and with respect to the measure of due care in the selection of physicians, and the following of their prescriptions and directions, have an immediate bearing upon the ques-

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tions involved and are in our judgment controlling: *Packet Co. v. Hobbs*, 21 Pickle, 29; *Baker v. Borello*, 136 Cal., 160; *Bloomington v. Purdue*, 99 Ill., 329; *Sauter v. Railroad*, 23 Am. Rep. 18; *Foels v. Tonawanda*, 14 N.Y. Supplement, 46; *Cavin v. Troy*, 44 N. Y. Sup., 244; *Pike v. Jamestown*, 15 N. D., 157.

Physicians and surgeons are licensed by the State, and from time immemorial have been the guides and advisors of sick and injured people in times of suffering; ordinary prudence dictates that medical men be consulted in such crises; and if they are to be consulted, their advice should be followed; if followed, with good or ill consequences, the wrongdoer should not be heard to complain; and when the conduct of the injured person is to be tested by the rules of ordinary care, it would be perfect folly to deny the wronged one the right to give as her reason for her course the following the direction of a professional health director. The 3rd and 4th assignments of error must be overruled.

The 5th assignment of error is to the effect that the Circuit Judge should have set aside the verdict because it is a gambling one. This assignment has given us more concern than that of any other. The Circuit Judge evidently found that this was not a gambling verdict in the sense of the rules obtaining in Tennessee, after oral examination of jurors. It was disclosed by the examination of a juror that when the jury retired to the room some time was spent in consultation, after which a vote showing quite a disparity in amounts. After this discussion and this vote a juror suggested that they strike an average by writing the several amounts which each juror thought should be awarded and divide the same by twelve. This was done. The quotient was about \$7,500; it may have been exactly \$7,500; although upon this point the juror is not quite clear. The juror-witness stated that his fel-

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lows and he then discussed the matter for awhile and agreed upon returning a verdict for the amount. He states that some jurors went beyond the amount to which they thought Miss Rogers was entitled, and some of them came lower than they thought she should have. At all events, it substantially appears that the quotient verdict was the amount finally agreed upon. There was no antecedent agreement to make this the verdict, nor was there any decision by the jurors that this amount should be their report until after it had been ascertained and subsequently discussed.

We have always understood the rule to be that if there was no antecedent agreement to abide by the result, the fact that the jury subsequently agreed upon a quotient verdict will not vitiate their report, especially if after the quotient is ascertained they discuss it and deliberately agree upon the amount thus ascertained: *Harvey v. Jones*, 3 Hump. 157; *Johnson v. Perry*, 2 Hump. 567; *Memphis v. Pilleaux*, 9 Heisk. 248; *Williams v. State*, 15 Lea, 129; *Glidewell v. State*, 15 Lea, 133; *Ferguson v. Moore*, 14 Pickle, 347; *Joyce v. State*, 7 Baxter, 273; *Railroad v. Winters*, 1 Pickle, 248.

If the rule contended for to the effect that simply because a jury report the *amount* resulting from a division as their verdict it must be treated as a gambling one, then a jury must be forever prohibited from adopting that sum or approximating it. We overrule this assignment of error.

In this connection it is urged by learned counsel for appellee that the assignment attacking the verdict was made in the lower Court after the expiration of thirty days from the return of the verdict, and that this ground should be disregarded. There is no rule in the lower Court upon the subject. But this Court and the Supreme Court

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have a rule in substance that no ground of motion not brought to the attention of the lower Court will be considered on appeal. It is urged that this rule should be treated as a statute, and that the lower Court should be denied the right to amend or allow an amendment to the motion. We are of opinion that this cannot be considered a guide for trial Courts. In the absence of a rule, a general motion for a new trial would have the effect of suspending judgment and opening up the verdict to any number of attacks during the time granted by the lower Court for consideration thereof; and if correct in this view, there could be assigned grounds of motion as the party may offer upon the day upon which the motion is heard. This must be true in a jurisdiction where a Circuit Judge may of his own motion set aside a verdict: *Devall, v. Devall*, 40 L. R. A. N. S., 291, and note.

Recurring to the first assignment of error, it is said that the verdict is so excessive as to manifest passion, prejudice or caprice. The amount awarded is substantial, even ample. It might not have met our approval if we were sitting as a trial Court. But we do not think we are authorized to disturb a verdict unless it be so large as to evince passion, prejudice or caprice. There were two or three theories in the lower Court according to the views of, or adoption of which verdict to be rendered should have been large or moderate. The jury took those theories which justified a substantial recovery. One of the questions was as to whether Miss Rogers had by her lack of ordinary care and because of mistake of physicians aggravated her injuries. The jury found in her favor. Another contention was that her injuries were in the main caused by other things than the fall received. The jury decided in her favor upon this issue. Another question was as to whether she was permanently or temporarily injured in her kneecaps

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or knee joints, and whether because of this condition she would have to forego her profession. The jury seem to have resolved these matters in her favor. There is quite a singular feature in this case, namely, the fact that she continued to dance and to teach this art for some months after her injury. It of course is rather unusual that if she had received a very great injury she could do this. But she adduced evidence tending to show this and explaining her conduct, and with this resolved in her favor by the jury, her right to a good sum, to be measured by the jury, followed.

The judgment of the lower Court will be affirmed.
Plaintiff in error will pay the costs.

Judge Hall dissents. He is of opinion that the verdict is a gambling one.

Henegar v. Junior Order.

LAURA HENEGAR v. N. C. JUNIOR ORDER.

1. FRATERNAL INSURANCE. *Death benefits. Automatic suspension.*

The beneficiaries of a death certificate issued by a fraternal insurance company to a member of a local council cannot maintain an action upon this certificate where the member was not in good standing and in the assurable class at the time of his death.

2. SAME.

One of the constitutional provisions of the order was that a member who was in arrears with his dues for more than thirteen weeks should be treated as not in good standing and not entitled to benefits. All the constitutional provisions and by-laws of the order were made parts of the contract. *Held*, That the beneficiaries of the defaulting member could not recover, notwithstanding he was not suspended by his local council, but was on the contrary treated as a member.

3. SAME. *Waiver of provision by acceptance of dues paid by local council.*

The National Council of such society cannot be held to have waived this constitutional provision by receiving and retaining dues of the defaulting member sent in by the local council after the member had been in arrears more than thirteen weeks.

FROM CARTER COUNTY.

Appealed from the Chancery Court of Carter County.
HAL HAYNES, Chancellor.

JOHN H. TIPTON for Complainant.

C. C. COLLINS and J. N. EDENS for Defendants.

MR. JUSTICE HALL delivered the opinion of the Court.

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THE bill in this cause was filed by Laura Henegar, widow of J. W. Henegar, deceased, in her own right, and as next friend of his minor children, against the National Council, Junior Order United American Mechanics, and one of the local councils of said order known as Elizabethton Council No. 1, to recover a funeral benefit for \$250 alleged to be due from said National Order to the dependents of the said J. W. Henegar, deceased.

The bill alleges that the deceased was a member of Elizabethton Council No. 1, a subordinate branch of said National Order, at the time of his death, and that by an arrangement of said subordinate council with the National Order its membership was enrolled with the latter order, and upon the payment of certain dues monthly by the local council for each member to the National Order, each member was entitled to a funeral benefit of \$250, to be paid from what was known as the funeral benefit department of said National Order, to the deceased member's widow, or dependents.

Complainant alleges that her husband was a member of Elizabethton Council No. 1 at the time of his death, which occurred on the 8th day of March, 1912, in good standing, and his dependents were entitled to said benefit under the by-laws and constitution of said National Order and its local council; that the National Order had refused to pay said benefit, and the bill asked for a decree against it and the local council for the full amount of said benefit.

The National Order answered the bill, denying that complainant was entitled to collect from it said funeral benefit, because, at the time of the death of the said J. W. Henegar, he was not a member in good standing with said National Order and its local council, being more than thirteen weeks in arrears with his dues, which it was necessary for him to pay to the local council in order to be

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entitled to such funeral benefit, as provided by the by-laws of said National Order, and being thus in arrears he had forfeited his right to such funeral benefit.

It appears from the record in this cause that the National Council, Junior Order United American Mechanics, is a corporation of the State of Pennsylvania, and that it had under it organizations or bodies known as local councils, also a State council; that the local councils are organized in the various States, and are composed of individuals forming the local membership.

It appears that the National Council or Order has what is known as a funeral benefit department, which pays funeral benefits on the death of members of the local councils; that the local councils are members of this funeral benefit department; that the members are not insured as individuals, but the local membership is insured as a body; that the local councils, by becoming members of the funeral benefit department of the National Council, become liable to the National Council for dues to be paid on the number of members belonging to the local councils, and pay to the funeral benefit department direct, looking to its members for dues from them. In other words, it appears that the funeral benefit department of the National Council does not collect anything from the individual members who compose the local councils, and does not deal with them direct in any way in the collection of dues. It further appears that, in the matter of paying benefits for the benefit of deceased members, the payments are made by the National Council direct to the local council, and by the local council paid to the beneficiaries of the deceased members on whom such payments are made; that preliminary to making such payments by the National Council to the local council, the local council must make out and furnish proofs of death for such deceased member.

Henegar v. Junior Order.

By section 14, division 8, of the constitution and by-laws of the National Order, it is provided as follows:

"No member who is in arrears for dues for thirteen weeks (or for such period as causes him to become non-beneficial according to the laws of his State and subordinate council) at the time of his death or at the time he becomes sick or disabled shall be entitled to death benefits, and no member who is thirteen weeks (or for such period as causes him to become non-beneficial according to the laws of his State and subordinate council) in arrears for dues at the time he becomes sick or disabled can place himself in good standing or become entitled to benefits during such sickness or disability by paying up such arrearages in part or in full during the continuance of such sickness or disability."

The constitution and laws of the State Council, chapter 8, section 5, also provide that any member allowing himself to become thirteen weeks in arrears for dues shall not be entitled to any benefit till all arrearages shall have been paid by one payment in full.

It is also shown that the local council, in its application for the funeral benefit to be paid by the National Order to its members, agrees to make no claim upon the National Order for benefits upon the death of any member who is not in good standing in the council at the time of his death, or who is not entitled to benefits according to the constitution and laws of the National Council.

The undisputed evidence shows that the member, J. W. Henegar, was more than thirteen weeks in arrears with his dues at the time he became sick, and at the time of his death on March 8, 1912; that he was not in good standing with the local council and National Order under its

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constitution and by-laws, which, by operation of law, became a part of the contract between the National Order and the local council, under which said funeral benefit was to be paid. The undisputed proof is that, subsequent to the death of the said J. W. Henegar, the local council at Elizabethton, knowing and recognizing that J. W. Henegar was not in good standing with the order as required by its constitution and by-laws, undertook to put him in good standing by remitting to the National Order an amount sufficient to bring him within the thirteen weeks' limitation provided by the by-laws of the National Order, and this amount was credited by the local council upon his arrearages as of date March 5, 1912, which was a date prior to that of his death, and said amount was remitted by the local council to the National Order, who was in total ignorance of the arrearages and bad standing of the said J. W. Henegar, and the fact of his arrearages and bad standing was not disclosed to the National Order until some time afterwards when specific proofs of death were made out and filed with it by the local council.

The Chancellor was of opinion that, notwithstanding the arrearages and status of the deceased at the time of contracting his illness, and at the time of his death, the complainant was entitled to recover, because the deceased had never been suspended by the local council for such arrearages, and not having been suspended by the local council, he was still a member and entitled to all the benefits of a member under the constitution and by-laws of the order, and rendered a decree against the National Order for the amount sued for, dismissing the bill as to the local council.

From the decree rendered against it the National Council has appealed to this Court, and assigns the holding of the Chancellor for error.

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The defendant National Council relies on the provisions of the by-laws hereinbefore set out in this opinion as barring the complainant's right to recover, insisting that, under the express terms of these by-laws, it is not liable to the complainant for said benefit for the reason that the insured, J. W. Henegar, was in arrears more than thirteen weeks at the time he was taken sick, and at the time of his death; and that the payment made by the local council on his behalf after his death could not have the effect of placing him in good standing with the order so that his beneficiaries or dependents would be entitled to said funeral benefit. In other words, that on account of the arrearages of the insured at the time he was taken sick, and at the time of his death, he had forfeited his right to said funeral benefit, and that said funeral benefit could not be saved to him by reason of the local council undertaking to pay up his arrearages for him after his death.

It is further insisted by the National Order that it was not necessary for the local council, by affirmative action, to suspend said member in order to deprive him of said funeral benefit.

We are of opinion that these contentions are well taken. By the very terms of the by-laws of the National Order themselves, a member who is in arrears for dues for thirteen weeks at the time of his death, is in bad standing with the local council, and forfeits his right to the benefit conferred. We are of opinion that it was not necessary for the local council to first have suspended the insured in order to deprive him of the benefit. The by-law was self-executing, and operated to suspend the member from the benefits conferred by the funeral department. In other words, under said by-laws, he forfeited all right to said funeral benefit by reason of being in arrears with his dues. This did not affect his membership in the coun-

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cil for other purposes. Under the constitution and by-laws of the council he remained a member for other purposes, but was not entitled to the benefit conferred by the funeral department of the National Council.

The laws of a benevolent society, when pertinent, and not in conflict with the statute laws of the State, or the recognized rules of public policy, become part of its contracts with members, and are binding on the parties. *Supreme Lodge K. of P. v. LaMalta*, 95 Tenn., 157; *Catholic Knights v. Kuhn*, 91 Tenn., 214; *Ida O. Perkins v. National Council*, Mss. opinion Court of Civil Appeals, filed August 28, 1913.

It is insisted however, by the complainant that the National Council is estopped from denying the complainant's right to collect said funeral benefit, because the evidence shows that it retained the sum remitted to it by the local council after the deceased's death, and has never tendered that sum back to the local council.

We do not think its failure to tender back the sum remitted by the local council, after the death of the insured would have the effect of estopping the National Order from denying liability. We think the question of repayment of the dues is a matter purely between the local council and the National Order. The National Order did not deal with the member direct. The undisputed proof is, that the local council collected dues from the individual member, and a portion of these dues was remitted by the local council to the National Order, as dues on the funeral benefit. In other words, the local council became responsible to the National Order for the payment of the funeral benefit dues, and could only escape its liability for such dues by dropping the delinquent member, and notifying the National Council that his name had been dropped from its funeral benefit list. As to whether the National Coun-

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oil is liable to the local council for the dues paid by it for the insured after his death, is not a question before us for determination. We are clearly of opinion, however, that the local council could not put the member in good standing with the National Council so as to entitle his beneficiaries to said funeral benefit by paying up his arrearages after his death.

It results that the decree of the Chancellor will be reversed, and the complainant's bill will be dismissed with costs.

LIFE INSURANCE COMPANY V. JAMES B. FISHER.

Affirmed by Supreme Court, Jackson, 1915.

1. INJUNCTION AGAINST PROSECUTION OF SUIT IN A FOREIGN STATE.

Courts of Equity in this State have the power and jurisdiction to enjoin a citizen of this State from going into another State and re-instituting against a citizen of this State a suit which had been dismissed against the latter.

2. SAME. *Duty to obey injunction irregularly issued.*

It is the duty of the party against whom an injunction has been granted to obey the same although irregularly or improvidently granted, provided the Court had jurisdiction to grant the writ.

FROM SHELBY COUNTY.

Appealed from the Chancery Court of Shelby County,
Part 2. F. H. HEISKELL, Chancellor.

Insurance Co. v. Fisher.

L. H. DOTY for Fisher.

G. T. FITZHUGH for the Insurance Companies.

MR. JUSTICE HALL delivered the opinion of the Court.

THESE two causes involve appeals by the defendant, J. B. Fisher, from a judgment in each of said causes holding said defendant guilty of contempt for the willful violation of injunctions duly issued by the Chancery Court of Shelby County, Tennessee, in two separate suits filed against him by said Insurance Companies in said Chancery Court at Memphis on April 9, 1914, in which injunctions were issued enjoining said defendant from prosecuting certain suits instituted against said Insurance Companies in the Circuit Court of Pearl River County, State of Mississippi, on February 23, 1914, in which it was sought by the defendant Fisher to recover on some insurance policies issued to him by said companies insuring himself and wife against injury or death by accident, and upon which the defendant Fisher had previously sued in the Chancery Court of Shelby County, which suits he had dismissed without prejudice, after litigating the same with the Insurance Companies for a period of six or seven years, without success. In said suits he was seeking to recover the insurance on his wife, whom he alleged had died of an accidental injury.

The defendant Fisher was a resident of Shelby County, Tennessee, and was within the jurisdiction of the Court at the time said bills were filed. Without setting out the allegations of the bills in detail, it suffices to say that they alleged that the suits instituted by the defendant Fisher against said Insurance Companies in the Circuit Court of Pearl River County, State of Mississippi, were fraudu-

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lent, malicious, and instituted for the purpose of harrassing and annoying the complainants and putting them to great trouble and expense of litigating in another State exactly the same issues which they had litigated with said defendant for about six years in the State in which the defendant resided, and where the contracts of insurance were made, and in which all the witnesses that knew anything about said litigation resided, in a tribunal of the defendant's own selection, and in which there was no obstacle in the way of doing complete justice between the parties, and the granting to either of any relief to which he might be entitled under the law of the State in which defendant resided, and in which said Insurance Companies had become domesticated.

The injunctions in said causes were issued upon the fiat of the Chancellor in each cause, and restrained the defendant, J. B. Fisher, or any of his agents or attorneys from further prosecuting said suits pending in the Mississippi Court, or from taking any further steps looking toward the prosecution of said suits in the State of Mississippi, or from seeking to secure any judgment by default or otherwise in said suits, or any other step whatever therein. These injunctions were not executed personally on the defendant Fisher, for the reason, he could not be located, but were executed by the sheriff on L. H. Doty, attorney of record for J. B. Fisher, service having been made on Mr. Doty on April 9, 1914, at five o'clock P.M.

On April 18, 1914, each of the complainants filed its petition, respectively, in said causes in which said injunctions had been granted and issued, praying that attachments for contempt be issued against the said J. B. Fisher for his willful and deliberate violation of said injunctions. Said petitions which were sworn to and supported

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fact that two of his counsel withdrew from the causes, and asked that their names be stricken from the docket on the ground that they felt that they were bound by said injunctions, and did not wish to run counter to the process and orders of the Chancery Court, of Shelby County, said Fisher insisted on other counsel proceeding in the causes, and in response to such insistence they announced that they would proceed, and that they accordingly argued the causes in spite of said injunctions, and said Fisher willfully and deliberately violated said injunctions, with full knowledge of the consequences which were called to his attention.

The petitions further alleged that it was necessary for counsel for the Insurance Companies to file pleas in abatement in said suits which had been instituted by the defendant Fisher in the State of Mississippi to prevent the said defendant from taking judgments by default in violation of said injunctions.

The attachments were issued in accordance with the prayer of said petitions, and the body of the defendant Fisher was attached in accordance with the orders of the Court, and he subsequently gave bond for his appearance before the Court to answer said contempt proceedings. He answered the petitions, denying the material allegations.

On a hearing the Chancellor entered decrees finding the defendant Fisher guilty of violating the injunctions in each cause; held him to be guilty of contempt of Court, and his punishment was fixed at a fine of \$50.00, and five days in the county jail.

The decree, among other things, recites:

"And the defendant being in Court on the attachment heretofore issued against him on said petition, and the Court having heard the said petition, exhibits thereto, writ

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of injunction aforesaid, and return thereon, and affidavits filed in support of the petition for attachment, and all the other evidence, and the defendant having declined to testify in support of his answer, which shows no sufficient excuse for violating said injunction.

And it appearing to the satisfaction of the Court from all the evidence introduced that said defendant willfully and deliberately violated said injunction while the same was in full force and effect and after he had actual knowledge thereof by continuing in the face of said injunction and his notice thereof to prosecute the said suit and taking further steps thereunder in violation of the said injunction.

It is accordingly therefore ordered and decreed by the Court that the defendant is guilty of a violation of the said injunction, and that he be and is hereby adjudged in contempt of the Court, and his punishment is fixed at a fine of fifty (\$50.00) dollars and five days in the county jail."

From the decrees in the respective causes the defendant Fisher has appealed to this Court, and has assigned errors.

The records are identical in each cause, as are also the questions presented. There was no bill of exceptions preserved in either of said causes. It, therefore, must be presumed that the decrees were warranted by the evidence. In other words, it must be presumed that the evidence offered by petitioners in the Court below showed that the defendant Fisher had actual knowledge of said injunctions, and had been guilty of a willful violation thereof. The only pertinent question raised by the assignments of error, which are several in number, is whether or not the Chancery Court had the power and jurisdiction to enjoin the defendant from prosecuting or taking any further

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steps in the causes pending in the Mississippi Court, and had the power and jurisdiction to deal with the defendant for a violation of its injunctive process with respect of the prosecution of said suits.

We are of opinion that this question must be determined in favor of the Court's power and jurisdiction. The defendant resided within the jurisdiction of the Court at the time said bills in the equity Court were filed, and said injunctions were issued. As before stated, this Court must presume that the defendant had actual knowledge of the issuance of said injunctions, and was guilty of a willful violation of them, the Court below having so found, and so recited in its decrees, which decrees themselves recite that they were based upon the evidence introduced, and no bills of exceptions are brought forward and presented to this Court that the Court may review the Chancellor's findings upon the questions of fact involved.

In the case of *O'Haire v. Burns*, 101 Pac. Rep., 755; 25 L. R. A. (N. S.), 276, the question of the power and jurisdiction of a Court of equity of one State to enjoin one of its citizens from prosecuting a suit in another State for just and legal reasons, is directly settled. In that case the plaintiff and the defendant, together with material witnesses, resided in the State of Colorado, where a cause had been litigated and terminated in favor of the plaintiff. Defendant instituted a suit on the same cause of action in Iowa, and an injunction was issued by a Court of equity in Colorado, restraining defendant from continuing the prosecution of said suit in Iowa, on the ground that the suit instituted in Iowa was for the purpose of annoying, harrassing, vexing and troubling plaintiff, subjecting him to needless expense in its defense, etc.

A demurrer was filed by the defendant challenging the jurisdiction of the Court to issue the writ, alleging the

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absence of equity in the complainant's bill, which was overruled and a decree for complainant was entered. The preliminary injunction was made perpetual, and the case was carried to the Supreme Court of Colorado, which affirmed the judgment of the lower Court in all respects. The Court saying:

"It is contended by plaintiff in error that such an action is in violation of the provisions of article 4, section 1, of the Constitution of the United States, in that it fails to give full faith and credit to the judicial proceedings of the State of Iowa, as contemplated by this section of the Constitution. It is also contended the result of such an injunction would be to bring about a conflict in the Courts and would be an effort by the Courts of Colorado to restrain the Courts in Iowa, which cannot be done, and the District Court was without jurisdiction, power, or right, under the complaint filed, to enjoin O'Haire from proceeding with his action in the Iowa Courts. The jurisdiction of the subject matter and of the person of Burns having been obtained in Iowa by proper process, it is claimed it cannot be questioned elsewhere; and the District Court of Iowa having first acquired jurisdiction of the subject-matter, to wit, of the transitory action where service was made upon Burns personally in Iowa, that no other Court would then have jurisdiction to control the matter, and that O'Haire had an absolute right to institute and carry on his action at law in the forum which he selected, and the District Court of El Paso County was without jurisdiction to prevent him from thus conducting his litigation. The decree in this case does not attempt to enjoin or control the Iowa Court in any manner, and is not a refusal to give the full faith and credit to its judicial proceedings contemplated by the Constitution of the United States, but is simply a decree restraining one of

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our own citizens from attempting to do that which is wrong, unlawful, against good conscience, stating when, and providing a method whereby there is, can, and should be, an end to litigation between citizens of our own State as to matters accruing therein."

In the case of *Keyser v. Rice*, 47 Md., 213; 28 Am. Rep., 448, the Court said:

"The power of the State to compel its citizens to respect its laws, even beyond its own territorial limits, is supported, we think, by a great preponderance of precedent and authority."

To the same effect is the rule announced in *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind., 148; 30 L. R. A., 363.

In the case of *Mason v. Harlow*, 33 L. R. A. (N. S.), 234, the Supreme Court of Kansas, in discussing this question, said:

"On the same principle that the Courts quite generally hold parties, witnesses, and even attorneys privileged from the service of process while in attendance on Courts and other judicial proceedings, public policy and the interests of justice alike require that Courts shall protect litigants from the malicious prosecution in other jurisdictions of suits the purpose of which is to interfere with or prevent the due administration of justice. Equity has power to restrain a party within its jurisdiction from prosecuting a suit in the Courts of another State, and in a proper case will not hesitate to exercise the power: *Cole v. Young*, 24 Kan., 435; *Gordon v. Munn*, 81 Kan., 537, 541; 25 L. R. A. (N. S.), 917; 106 Pac., 286, and cases cited; *Pickett v. Ferguson*, 45 Ark., 177; 55 Am. Rep., 545; *Snook v. Snetzer*, 25 Ohio St., 516; *Vail v. Knapp*, 49 Barb., 299; *Keyser v. Rice*, 47 Md., 203; 28 Am., 448. Courts will

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not enjoin a suit in another State merely on the ground of the convenience of parties, but will do so when the ends of justice require it: *Bank of Bellows Falls v. Rutland & B. R. Co.*, 28 Vt., 470."

In *Miller v. Gittings*, 37 L. R. A. (Maryland), 654, the Supreme Court of Maryland, in determining the question of the right of a Court of that State to enjoin the prosecution of a suit instituted by one of its citizens in another State, said:

"An injunction against the prosecution of actions in another State will be granted when the plaintiffs have gone out of their own State to sue a fellow citizen for the purpose of evading the laws of their State and their actions are oppressive and unreasonable, tending to embarrass and defeat justice. . . . The power of the State to compel citizens to respect its laws, even beyond its own territorial limits, is supported we think by a great preponderance of precedent and authority."

Mr. Joyce, in his valuable work on Injunctions, Vol. 1, section 606, in discussing the jurisdiction of Courts of equity in such matters, states the following:

"So it has been declared that a Court of equity may interfere to prevent the prosecution of an action which is inequitable and unconscionable even though such action is pending in the Courts of another State and without regard to whether the action in the former tribunal was commenced before or after the domestic tribunal may have acquired jurisdiction over it."

To the same effect is High on Injunctions, Vol. 1, section 106. This author has the following to say:

"As we have seen in a preceding section, a distinction is drawn between a Court of equity interfering with the

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action of the Courts of a foreign State, and restraining persons within its own jurisdiction from using foreign tribunals as instruments of wrong and oppression. While, therefore, the Court will assume no control over the course of the proceedings in the foreign tribunal, it may and will interfere to prevent those who are amenable to its own process from instituting or carrying on suits in other States which will result in injury and fraud."

It is not contended that the injunctions were void upon their face for any reason, and though they may have been improvidently granted, it was the duty of the defendant to obey them, and if he thought they had been improvidently granted, he had the right to take proper steps to have the injunctions dissolved. An injunction operates in *personam*, and binds the defendant, his solicitors, attorneys, agents, and servants, and renders it unlawful for them to do the act therein prohibited. If the injunction be issued on a misstatement of facts, the person against whom it is issued must nevertheless obey it until he can obtain its dissolution, or discharge. The inadvertant grant of an injunction neither makes it void, nor impairs its efficacy. Gibson's Suits in Chancery (1st Ed.), section 820.

We are clearly of the opinion that the Court was clothed with jurisdiction to entertain the bills filed by the petitioners, in view of their allegations, and possessed full power and jurisdiction to grant the injunctions issued against the defendant, who resided within the jurisdiction of the Court, and the defendant was bound to obey said injunctions until they were dissolved or discharged. The Court having jurisdiction of the subject-matter of the suits and power to grant said injunctions, it undoubtedly had the power and authority to punish the defendant for his willful violation of them.

The decrees in both causes are affirmed with costs.

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C. G. RENEGAR, FOR USE, ETC., v. SOUTHERN RAILWAY
COMPANY.

Affirmed by Supreme Court at Knoxville, 1915.

1. CARRIER OF GOODS. *Loss of. In whose name suit should be brought. Appointee.*

A party not the owner of goods shipped over a railway may in his own name and for the use of the real owners maintain an action against the carrier either in tort or in contract where the goods were shipped in his name at the suggestion of the agent of the carrier.

2. SAME. *Estoppel.*

In such case a carrier is estopped to deny the right of the appointee or bailee to maintain the action.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
V. A. HUFFAKER, Judge.

J. W. Fox for Plaintiff in Error.

L. D. SMITH for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS suit was instituted in the Circuit Court of Knox County by the plaintiff in error, C. G. Renegar, for his own use and benefit, and for the use and benefit of J. T.

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Brooks Produce Company and W. M. Gillenwaters, against the Southern Railway Company to recover damages sustained to a car of dressed poultry while being transported from Knoxville, Tennessee, to Atlanta, Georgia, over its line of road, the same being consigned to Turner Brothers at Atlanta, Georgia.

The plaintiff alleged in his declaration that on the 22d day of December, 1913, he delivered in freight car No. 6030 A. R. L., furnished him by the defendant company, 24,550 pounds of fresh dressed poultry in good condition, the property of plaintiff and the said J. T. Brooks Produce Company and W. M. Gillenwaters, to be shipped or transported by said defendant company to Turner Brothers at Atlanta, Georgia; that said car of poultry was shipped in the name of plaintiff, C. G. Renegar, in a refrigerator car, properly cooled, refrigerated, and put in proper condition, having its ice bunkers properly filled with sufficient ice to keep said poultry cool and in good condition throughout the period of transportation, but through the negligence of the defendant company, while said car was being transported from Knoxville to Atlanta, Georgia, and before the same was delivered to the consignees at Atlanta, said car was wrecked, broken and mashed so as to permit the refrigeration or cold air, confined in said car as a result of the same being properly iced, to escape from said car and to become filled with warm air, which passed into said car through the openings made in the same by and through the negligence of the railway company, thereby exposing said dressed poultry to said warm and unrefrigerated air, causing it to deteriorate, decompose, damage, and to become practically unfit for use, all to plaintiff's damage.

To this declaration the railway company filed a plea of not guilty.

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A trial of the case in the Court below before the Court and a jury resulted in a verdict and judgment for the railway company, the verdict being directed by the Court upon the railway company's motion, made at the close of all the evidence, through its counsel. From this judgment the plaintiff below, C. G. Renegar, has appealed to this Court, and has assigned errors.

The plaintiff's evidence disclosed that a certain portion of said poultry belonged to him personally, and another portion to J. T. Brooks Produce Company, and still another portion to W. M. Gillenwaters, and it was intended by plaintiff, J. T. Brooks Produce Company, and said Gillenwaters to ship said poultry to different consignees in Atlanta, but that when they came to make the contract of shipment after said poultry had been loaded into the car it was suggested by the agent of the railway company that it was necessary, in order for them to secure a car-load freight rate, to ship said car of poultry in the name of one of said consignors consigned to one particular consignee at Atlanta. This suggestion was accepted and adopted by said shippers, and the entire car of poultry was shipped in the name of plaintiff below, C. G. Renegar, and was consigned to Turner Brothers, instead of the various consignees to whom said poultry was, in fact, to be delivered upon its arrival at Atlanta.

Upon the foregoing facts being developed by the plaintiff's evidence, counsel for defendant railway company made the point that no recovery could be had for damages in said suit to the poultry belonging to J. T. Brooks Produce Company and to W. M. Gillenwaters, for the reason, that damage or loss to each shipment, if any, constituted a separate cause of action. Thereupon, it was ruled by the trial Judge that the plaintiff Renegar could only recover for damage to his individual property and

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could not recover damages for property owned by Brooks and Gillenwaters, and refused and declined to permit the plaintiff to introduce proof showing the damage or loss to the portions of the poultry owned by J. T. Brooks Produce Company and W. M. Gillenwaters, respectively.

Thereupon, the plaintiff Renegar moved the Court to be allowed to amend the summons and declaration so as to strike out the words "for the use and benefit of himself and J. T. Brooks Produce Company and W. M. Gillenwaters," thus making said action in the name of C. G. Renegar, J. T. Brooks Produce Company and W. M. Gillenwaters jointly. The Court declined to allow this amendment, the proof showing that Renegar, individually, owned a portion of the property; J. T. Brooks Produce Company, individually, owned another portion, and W. M. Gillenwaters, individually, still another portion. The Court evidently proceeded upon the theory that a joint recovery could not be had in said suit for injury to three separate and distinct shipments belonging to entirely different parties.

After the ruling of the Court above mentioned, the plaintiff Renegar, on cross examination, testified that he and J. T. Brooks Produce Company owned jointly a portion of the shipment, to wit, twenty-three barrels of turkeys that were delivered to McCulla Brothers.

Upon this testimony being given by Renegar the Court ruled that the suit might be prosecuted in the names of J. T. Brooks Produce Company and Renegar for the recovery of any damages shown to have been done to the poultry jointly owned by them, but declined to allow the amendment as to Gillenwaters, because the proof showed that Gillenwaters had no interest whatever in the produce belonging to Renegar and J. T. Brooks Produce Company,

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and that J. T. Brooks Produce Company and Renegar had no interest in the produce belonging to Gillenwaters.

There was no evidence tending to show that there had been any loss or injury to the poultry owned by the plaintiff Renegar and J. T. Brooks Produce Company jointly. The only loss or injury sustained by any part of said shipment was to that portion belonging to Gillenwaters, and the twenty-three barrels of turkeys owned jointly by Renegar and J. T. Brooks Produce Company shipped to McCulla Brothers. The turkeys shipped to McCulla Brothers were delivered to them; accepted by them and paid for in full, with the exception of \$73.00, which McCulla Brothers deducted from the invoice price of said turkeys. Just why this \$73.00 was deducted by McCulla Brothers from the invoice price of said turkeys does not definitely appear from the proof.

At the close of all the evidence, the Court being of the opinion that Renegar and J. T. Brooks Produce Company had not sustained any loss to that portion of the poultry owned by them jointly, and the Court being of the opinion that there could be no recovery in said action for the damage to that portion of said shipment belonging to W. M. Gillenwaters individually, directed a verdict in favor of the railway company upon its motion, and judgment was entered accordingly and plaintiff was taxed with the costs of the cause.

The question presented by the assignments of error, and which is determinative of the case, is whether or not the poultry having been shipped in the name of the plaintiff Renegar as consignor, he had such special property in the same, though not the absolute owner of certain distinct portions of said shipment, he could maintain the present action in his own name to recover damages for injury to that portion of said shipment not belonging to him, for the

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use and benefit of the real owners. If he can recover at all, it must be upon this theory. He could certainly not recover for loss or damage to property in which he had no interest or special property that would enable him to maintain the action.

The action was one on the case and not one on the contract. The general rule is, where the action is one in tort, that the suit must be brought by the owner of the goods, or by some person having a special property in them. Where the suit is upon the contract of carriage, the right of action for the damages accrues to the consignor or person with whom the contract is made, immediately upon loss or injury to the goods, without regard to his interest or ownership. He may recover full damages in trust for the consignee or other person to whom the goods may have belonged: *Hutchison on Carriers* (3rd Ed.), Vol. 3, section 1314; *Carter v. Graves*, 9 Yerg., 446; 6 Cyc., 510.

We are of the opinion, in view of the agreement between the parties to turn the goods over to the plaintiff Renegar for shipment in his name, which agreement was made with the consent and approval of the railway company, that Renegar had the right to maintain the action not only for his own use and benefit, but for the use and benefit of the other parties who were the real owners of portions of said shipment.

We think the agreement had the effect, as between the owners of the goods, of constituting the plaintiff Renegar a bailee for the purpose of making shipment, and gave him such a special property in the goods as entitled him to maintain the action for the use and benefit of all the interested parties, and a recovery by him in such action would preclude a further recovery by any or all of the parties interested, and the railway company could in no

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way be prejudiced by permitting the plaintiff to recover the full damages sustained by the goods, which would naturally be held by him in trust for those for whose benefit the action was brought, to the extent of their respective losses.

"If the action against the carrier is in tort it should be brought by the owner of the goods, whether he be consignor or consignee or a third person. But it is not necessary that the ownership should be absolute; a bailee has such special property in the goods that he may maintain action for damage thereto. Anyone having a beneficial interest in the goods may maintain the action." 6 Cyc., 510.

The agreement to ship the goods in Renegar's name as consignor was made at the suggestion of the railway company's agent. Renegar, by said mode of shipment, became liable for the freight charges, and had other beneficial interests in the shipment; and the railway company, we think, is estopped to deny his right to maintain the present action for damages to said goods.

The judgment of the Court below, in so far as it adjudged that plaintiff in error could not recover for the damage sustained by that portion of the shipment belonging to W. M. Gillenwaters, is reversed, and the cause is remanded for a new trial as to said shipment; but in so far as the Court directed a verdict against the plaintiff in error as to his right to recover for damage to that portion of the shipment belonging to plaintiff in error and J. T. Brooks Produce Company jointly, is affirmed, there being no evidence upon which a verdict could be based as to that portion of the shipment.

The railway company will be taxed with the costs of this appeal.

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BANKS GROCERY COMPANY V. W. R. WHEATLEY ET AL.

1. PARTNERSHIP. *Liability of part owner of mercantile establishment.*

The owner of an interest in a mercantile establishment is liable for the debts of the concern, although he was considered as having a specific interest in the property without participation in profits, and although his name was unknown and he took no part in the management of the business.

2. JUDGMENTS AND DECREES AGAINST ESTATES OF DECEDENTS.

A decree which awards a recovery against the estate of a deceased party whose administrator is before the Court, is not void because rendered against an estate instead of against the personal representative. This is a mere irregularity.

3. CHANCERY PLEADING AND PRACTICE. *Requisite proof where oath of defendant waived.*

When complainant in his bill waives the oath of a defendant, the fact that the defendant nevertheless swears to his answer, will not impart to the answer any other effect than that of raising an issue. Complainant is not required to establish his case by two witnesses or one witness and corroborating circumstances.

FROM HARDEMAN COUNTY.

Appealed from the Chancery Court of Hardeman County. E. L. BULLOCK, Chancellor.

H. C. CARTER for Appellant.

A. J. COATES for Appellees.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

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THE bill in this case was filed bay 23, 1912, by the Banks Grocery Co., of Memphis, Tenn., and four other concerns, three of them doing business in the State of Missouri and one in the State of Illinois, against W. R. and J. A. Wheatley and W. R. Reynolds, Sir., of Hardiman County.

It was filed as a general creditor's bill against a business concern doing business under the firm name of Wheatley Brothers. The complainants allege that they are creditors of said Wheatley Brothers in amounts specified, one by judgment, and the others by accounts verified.

The bill alleges that said concern was indebted to various other parties and names several.

It is alleged that the defendants, in January, 1910, Bolivar, Tenn., under the firm name of Wheatley Brothers, and that January 3, 1912, judgments were taken against said firm by certain creditors, who had execution issued which were levied on their stock of goods which were sold, leaving complainants and the other creditors of the firm unpaid and that the property of defendants, W. R. and J. A. Wheatley had been exhausted by judgments and executions at law to pay the debts of Wheatley Brothers and that the said Wheatleys were insolvent and that nothing could be made out of them by judgment or execution at law.

The bill then alleges that defendant, W. R. Reynolds, Sr., was a partner in said firm of Wheatley Brothers, sharing equally in the losses and profits of the same, but that his name did not appear as a partner in the business; and the charge is that said Reynolds was a partner in said firm and that he owned a half interest in it, and, hence, was liable to complainants and all of the other creditors of the firm for the amount of their debts.

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It is alleged that originally, said business was run in the name of W. H. Reynolds, Jr., a son of W. H. Reynolds, Sr., but, nevertheless, at the same time W. H. Reynolds, Sr., was the owner of one-half interest in the business and a partner in the same, and that W. H. Reynolds, Jr., sold out his one-half interest in the business to his father, W. H. Reynolds, Sr., in 1911, and that while W. H. Reynolds, Sr., owned the entire business, still the same was run in the name of J. A. Wheatley, a son-in-law of said Reynolds, Sr., and that thereafter, September 1, 1911, said Reynolds, Sr., sold a one-half interest in his stock of goods in said business to the defendant, W. R. Wheatley, and the business was then run in the name of Wheatley Brothers, but that said Reynolds, Sr., continued to own a one-half interest in it, and that defendant, J. A. Wheatley, his son-in-law, acting as the agent of said Reynolds, Sr., managed and carried on the business.

In other words, the charge is that said Reynolds, Sr., was a partner in the business of Wheatley Brothers, owning a half interest in it and sharing equally in the profits and losses of the same, and, therefore, he was liable to complainants for the payment of their debts, the business being owned by W. R. Wheatley and W. R. Reynolds, Sr., jointly.

It is charged that no part of the business was owned by defendant, J. A. Wheatley, and that he only acted as the agent of said Reynolds, Sr.

It is charged that the business was carried on in this manner until January, 1912, when the creditors of Wheatley Brothers obtained judgments and executions and closed out the business and sold out the stock of goods, leaving the debts of complainants unpaid.

The prayer of the bill is that it be filed as a general creditor's bill in behalf of complainants and all the other

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creditors of Wheatley Brothers and that it be sustained as such.

An answer is asked from defendants, but their oath is waived. Defendants prayed that the *bona fide* creditors of defendants be required to prosecute their claims in this Court in this cause, they to be permitted to file their debts in term or in vacation, and be permitted to prove the same before the Master, and that they be granted all the benefits of this proceeding to which complainants may be entitled, and that the Master be directed to notify by publication the creditors of defendants to file their claims.

They pray that judgments be rendered against defendants W. R. and J. A. Wheatley and W. H. Reynolds, Sr., in favor of complainants for the amounts due them on their respective claims and in favor of all other creditors filing and proving their claims.

It is further asked that W. H. Reynolds, Sr., be declared a partner of the firm of complainant.

It is asked that all other creditors of Wheatley Brothers be enjoined from prosecuting any suit or suits against defendants in any Court and that they be required to prosecute their claims in this case in this Court.

It is asked that the Master be directed to take and state an account showing the name of the creditors of Wheatley Brothers, the amount due each, the probable amount of the cost and expenses of the suit, including a reasonable fee for the soliditors of complainants, and that complainants and other creditors of defendants be granted all such further and general relief as they may be entitled to. It is readily seen that the main object of this bill was to hold W. H. Reynolds, Sr., as a member of the firm of Wheatley Brothers and liable to pay the debts of complainants. The accounts claimed in the bill are made exhibits thereto. Defendant, W. H. Reynolds, Sr., answered

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the bill under oath, although his oath to the answer was waived June 1, 1912. He denied that he was ever at any time, a member of the firm of Wheatley Brothers, or a partner in said firm. He denied that he owned a one-half interest in said firm or any interest whatever. He denied that he shared any of the profits and losses in said business. He denied that he was in any way, manner, or form, liable for any of the debts or any obligations of any kind, of said Wheatley Brothers to complainants or to anybody else. He denied that he had any interest in said firm, or that he received any of the profits thereof. He denied that he was in any way, manner, or form, connected with the firm of Wheatley Brothers, or their business. He denied that he was indebted to complainants or any other person on account of Wheatley Brothers, and he says that every allegation in the bill charging that he was a partner of said Wheatley Brothers or owned a one-half interest in their business or any other interest, or was sharing the profits or losses of said business, or was at any time responsible for any debt contract or other obligation of said firm, or in any way or form connected with said business, is absolutely and unqualifiedly untrue. He avers that the business originally belonged to his son, W. H. Reynolds, Jr. That he bought said stock of goods and gave it to his son in order to start him in business; that later on, he bought a one-half interest in said business from his son for his daughter, Mrs. Maggie Wheatley, wife of defendant, J. A. Wheatley, and gave it to her, and that after this, his son, W. H. Reynolds, Jr., decided to retire from the business and go West, and he sold his interest to defendant, W. R. Wheatley; that at the request of J. A. Wheatley, respondent paid J. A. Wheatley the purchase price for W. R. Wheatley, on a promise that W. R. Wheatley would pay back the money to him in a few days, which he did. He

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alleges that after the sale of W. H. Reynolds, Jr., to W. R. Wheatley, the business was run in the name and style of Wheatley Brothers, and was owned by W. R. Wheatley and Mrs. Maggie Wheatley until her death, which occurred subsequent to the purchase of said interest by W. R. Wheatley in the business.

He alleges that J. A. Wheatley was engaged in said business before said W. H. Reynolds, Sr., retired as agents for his wife, Mrs. Maggie Wheatley, managing and looking after her interest in the same, and that after W. R. Wheatley came into the business J. R. Wheatley continued in the business as before, acting as agent for his wife until her death. That after her death, the business was continued on without any change so far as respondent knew, until he failed and the business was sold out. He alleges that the business was run, managed, and controlled by W. R. Wheatley and J. A. Wheatley from and after W. R. Wheatley came into business and that respondent had nothing to do with it, and had no interest in it, further than that he desired to see the business prosper on account of the infant children of his deceased daughter, Maggie Wheatley, who were dependent upon said business for support, and that this was respondent's object and purpose in giving her said one-half interest in said business, that is, to provide support for her and her minor children.

He alleges that all allegations in the bill charging that respondent was in any way liable for any debt, contract or obligation of Wheatley Brothers, or was in any way connected with the same, or interested in the same, not specifically denied, he denies generally and as fully as if separately and specifically denied.

It appears that Monday, September 20, 1912, the death of defendant, W. H. Reynolds, Sr., was suggested and admitted in open Court, and by consent of solicitors of L. B.

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Reynolds and W. H. Reynolds, Jr., given in open Court the cause was continued until the following term.

The deposition of W. R. Wheatley, it appears, was taken for complainants. It is of considerable length.

Several other depositions were taken in the case, to which there were numerous exceptions, some of which were sustained and other overruled by the Master.

The cause came on for hearing before Chancellor Bullock, we infer from the record, in October, 1913. He filed a memorandum opinion to the effect that the claims sued on in the bill had not been established by any evidence and in that shape he would have to dismiss the bill, but that one of the defendants had asked for a remand of the case, and, exercising his discretion under the authorities, remanded the cause for proof by both parties, fixing the time in which it was to be taken.

The bill was taken for confessed as to W. R. and J. A. Wheatley.

It further appears that in March, 1914, the death of W. H. Reynolds, Jr., one of the joint administrators with the bill annexed of W. R. Reynolds, Sr., was suggested and admitted in open Court, and the cause was revived or permitted to stand for further proceedings against the surviving administrator with the will annexed, to wit, L. B. Reynolds.

The will of W. H. Reynolds, Sr., appears in the record, but there is an agreement of counsel that it is improperly copied in the transcript, as it was not offered in evidence in the case and it is agreed that it is no part of the record in this case.

It appears that the the cause came on for final hearing before the Chancellor in March, 1914, upon the bill, answer of defendant W. H. Reynolds, Sr., and the proof and argument of counsel. His Honor, the Chancellor, held that

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W. H. Reynolds, Sr., was the owner of one-half of the stock of goods involved, and that he was, therefore, liable for the debt sued on in this case. He therefore gave judgment against W. R. Wheatley and the estate of W. H. Reynolds, Sr., deceased, in favor of the Banks Grocery Co., for \$204.89, and in favor of the Allen Coffee Co., for \$21.29, and in favor of Swift & Co., for \$11.33, and in favor of the Jackson Vinegar Co., for \$98.17, and in favor of the George Bosche Produce Co., for \$20.04, and the Judge decreed that execution in favor of complainants against defendants, W. R. Wheatley and L. B. Reynolds, with the will annexed of the estate of W. H. Reynolds, Sr., for \$355.23 and the costs of the suit, the said sum being the correct sum due the creditors before set out in his decree.

The defendant, L. B. Reynolds, surviving administrator, with the will annexed of the estate of W. H. Reynolds, Sr., excepted to the ruling and decree of the Court in adjudging that W. H. Reynolds, Sr., was the owner of one-half of the stock of goods and liable for the debts sued on in this case, and to so much of the decree as adjudged that complainants recover of the estate of said Reynolds, and prayed an appeal, which was granted to this Court, upon condition that he execute and file bonds as conditioned and required by law within thirty days from the date of the decree and for satisfactory reasons appearing he was allowed thirty days in which to prepare and file bill of exceptions. No bill of exceptions was filed within the time allowed.

A motion is made in this case before this Court to dismiss the appeal because no proper appeal bond was filed, and counsel representing the appellant stated in open Court that a proper appeal bond would be given. Of course, the appeal bond filed in this case is not the appeal

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bond required by law, and unless a proper appeal bond is filed, the appeal will be dismissed.

Assuming that a proper appeal bond will be filed, the case is before us upon the assignments of error by the administrator with the will annexed. These assignments are as follows, in substance:

1. That the Court erred in excluding certain evidence offered by plaintiff in error, or, properly speaking, the appellant. This evidence is set out as a part of the assignment.

2. The second error is, that the Court erred in admitting the following evidence offered by complainant over the objection of appellant. This evidence is set out, in connection with, and as a part of this assignment.

3. The Court erred in finding from the proof and adjudging that W. H. Reynolds, Sr., was the owner of one-half of the stock of goods of Wheatley Brothers and that he was liable for the debts sued on in this case.

4. The Court erred in decreeing that W. H. Reynolds, Sr., or his estate, was liable for the debts of Wheatley Brothers, and in decreeing that complainants recover of W. R. Wheatley and the estate of W. H. Reynolds, Sr., the amount of complainants' debts, to wit, \$355.23, and the costs of the cause, the Court finding that W. H. Reynolds, Sr., was a member of the firm of Wheatley Brothers or a co-partner of Wheatley Brothers.

5. The Court erred in finding that W. H. Reynolds, Sr., was liable for the debts of Wheatley Brothers and decreeing that complainants recover of his estate their debts against Wheatley Brothers amounting to the sum aforesaid and costs of the cause.

We have examined the record in this case and we feel constrained to hold, under the weight of the evidence, that

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W. H. Reynolds, Sr., as held by the Chancellor, owned a half interest in the business of Wheatley Brothers, and, in the sense of the law, was a partner of said firm.

Now, if we are correct in this holding, it settles the determinative question in the case. The exceptions to evidence in this case and the rulings of the Chancellor thereon were not preserved by any bill of exceptions and we cannot consider them. His rulings are not set out in his decree, nor do his rulings appear by any notation upon the depositions. Quite a number of rulings were made by the Clerk and Master, and if there was any appeal from the rulings of the Master, we have been unable to discover that the action of the Chancellor on his rulings was invoked. So, we cannot consider the question raised with respect to the admission or rejection of evidence.

Quite a technical question is made by the learned counsel of appellant, that the decree is erroneous, in that, the decree recites that it is a decree or judgment against the estate of W. H. Reynolds, Sr. We are rather inclined to think that this is an endeavor, to use the language of a very learned Judge in the past history of the State, to "run between the acorn and the hull," and, in doing so, it is "sticking in the bark." The effect of the decree is, that estate of W. H. Reynolds, Sr., is liable for the debts sued on, and that an execution issue against the administrator of his estate with the will annexed.

Another nice question is made by the learned counsel, to the effect that the answer of W. H. Reynolds, Sr., being under oath, has, in law, the effect of a deposition, and casts upon the complainant the burden of establishing their debts by two witnesses, or by one witness, with strong corroborating circumstances. In support of this position, he cites the case of *Trabue, Davis & Co. et als. v. Turner, Admr., et als.*, 10 Heiskell, 450, 451. An examination of this

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case and the opinion by Chief Justice Nicholson does not, in our opinion, sustain the contention of learned counsel. In that case, the bill was filed in the Chancery Court by a number of the creditors of J. W. Durham & Brother, charging that they had fraudulently sold a stock of goods to J. R. Stone for the purpose of avoiding the payment of their debts. The charge was made in the bill, that Stone knew of this purpose, and participated in their fraudulent design. The bill in the case was sworn to by an agent of complainants, who swore that the facts stated in the bill, as of his own knowledge, were true, and that those stated on information and belief he believed to be true.

An attachment was granted and issued to attach the stock of goods, which was taken, and they were replevied by Stone. The bill was filed against J. W. Durham and P. S. Durham, Joshua R. Stone and others.

J. W. Durham died, leaving P. S. Durham, the surviving partner, who failed to answer.

J. R. Stone answered and denied specifically and emphatically every allegation of fraud as to himself and all knowledge of any fraudulent design on the part of the Durhams. Said Judge Nicholson: "The controlling question in the case is whether the allegation of fraud as against the Durhams and Stone is made out by the evidence."

It is insisted for complainants, that, as the attachment bill is sworn to, as well as the answer, the result is, that the bill and answer only make up the issue, and that as the allegations of the bill are sustained by one witness, that is sufficient to entitle them to a decree.

It appears, we assume in that case, that the answer under oath of defendant Stone, was not waived, and that he answered under oath. It has been repeatedly held, that where the bill is sworn to, the denial in the answer, the oath of defendant being waived, has only the effect to make

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an issue between the parties, and to require the complainant to prove his case in order to entitle him to a decree, and, says Judge Nicholson, of course, in such a case "one creditable witness would be sufficient to sustain the bill." *McLard v. Linnville*, 10 Hum., 164.

And Judge Nicholson said:

"The general rule thus recognized has been ever since followed by this Court. We are aware of no rule that makes the answer of the defendant in a case, his oath being waived, that gives it the effect of a deposition. The rule, we think, is well established, that the sole effect of an answer in the case put, is put in issue the claim or contention of the complainant, and to require the establishment by such proof as satisfies the Court."

There is no reversible error in the decree of the Court below and it will be affirmed with cost.

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BANK OF HENNING v. L. B. GRAVES ET AL.

1. ALTERATION OF INSTRUMENTS. *Striking out immaterial clause. Implied consent of maker.*

The alteration of a promissory note by striking out an immaterial clause which did not change the contractual relations, if innocently made, will not defeat the right of the payee to recover.

2. SAME. *Striking out so as to conform to understanding of parties.*

The striking out of a clause of a note so as to conform to the real understanding of the parties made in good faith does not vitiate a promissory note.

3. SAME. *Questions of good faith and implied authority.*

Whether certain alterations in a promissory note were made in good faith and presumably with the consent of the maker, are questions of fact which should be submitted to the jury in a suit wherein the alteration is relied upon to defeat collection.

FROM LAUDERDALE COUNTY.

Appeal in error from the Circuit Court of Lauderdale County. S. J. EVERETT, Judge.

STEELE & STEELE for Plaintiff in Error.

CRAIG & BULLOCK for Defendants in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS suit was commenced August 20, 1913, before a Justice of the Peace by plaintiff in error to recover from L. R. Graves and R. E. Downing on a promissory note for

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\$402.60 executed January 1, 1913, and due six months after date, and made payable to plaintiff in error.

Defendant Downing, when the suit was brought, had moved to Dyer County, and a counterpart summons was served upon him in that county.

Mr. Graves put in a special plea of *non est factum* before the Justice of the Peace, which will be noticed further on in the opinion, as well as the note sued on.

The Justice of the Peace, September 9, 1913, heard the case, which was taken under advisement by him until September 22, 1913, when he rendered judgment upon the note with interest, with an attorney fee of \$25.00 and cost against both Mr. Graves and Mr. Downing.

Mr. Graves prayed, was granted, and perfected an appeal to the Circuit Court of the county.

Mr. Downing did not appeal.

The case was heard in the Circuit Court before the Judge thereof and a jury, in August, 1914.

The jury returned a verdict in favor of Mr. Graves and the bank was taxed with the costs. It moved for a new trial, stating ten grounds in support of its motion. Its motion was overruled and it appeal in error to this Court. It assigns in this Court the following errors:

1. There is no material evidence to support the verdict of the jury.

2. The great weight of the evidence is against the verdict of the jury, and in favor of the contentions of the bank.

3. The Court erred in charging the jury as follows: "If you are satisfied from the proof in this cause by a preponderance of the evidence, that at the time L. R. Graves signed the note as security, that it had attached to it another note as collateral and that it also contained

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the words, 'Collaterals have been deposited with and pledged to said bank as follows'—and that after he signed said note this language that I have just read to you was stricken out, and that the collateral was detached from the note so as to change the note from what it was when he signed it, then plaintiff in this cause could not recover and your verdict would be for the defendant."

4. The Court erred in charging the jury as follows: "Or if you find this note was sent to Newbern and signed there by Mr. Downing and that before Mr. Graves signed this note this language—'Collaterals have been deposited with and pledged to said bank as follows;' was stricken out and this collateral detached, then your verdict would be for the plaintiff."

5. The Court erred in the following part of his charge: "Now, if you find by a preponderance of the evidence—the burden is still upon Mr. Graves to show that,—if you find that by a preponderance of the evidence that this collateral note had been with this note through the different renewals and followed on down to this, and was agreed and understood at the time this note was made and Mr. Graves signed it, that this collateral note should be exhausted before he was to be liable, and you further find that no effort had been made to collect the collateral note, or to exhaust the collateral, then, the plaintiff could not recover."

6. The Court erred in refusing to charge this request of the bank: "If you find from the proof that the words were marked out in the note after Mr. Graves signed the note, and you further find there was no agreement between Mr. Graves and the bank that any collateral should be held as security for this note, then I charge you that the erasure of said words would not be a material alteration of said note, and would not change the legal effect of the parties

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or the instrument, and if you find the facts that way, your verdict should be for the plaintiff, and the burden of proof is upon Mr. Graves to show that there was an agreement that said collateral was to be held for this note."

The seventh assignment of error is directed to the refusal of the Judge to charge this request of the bank: "If you find from the proof that the note sued on was drawn up by Mr. Lipscomb, the cashier of plaintiff bank, and by him mailed to Mr. Downing at Newbern, and that when the note was drawn up, that immediately after the words—'Collaterals have been deposited with and pledged to said bank as follows:'—contained in said note, that three or four blank lines on a blank space were left in said note immediately after and following said words above set out, so that a description of collaterals could be filled in said lines, or blank spaces, on said note, and that the purpose of said words was to identify any collateral that might be described in said blank spaces, and that the note was sent to Mr. Downing in this condition, and that the said Downing signed said note at Newbern, and that when he signed same, that he signed above said three or four lines or the blank space left in said note, and returned same to plaintiff in that condition, and that after same was returned to plaintiff at Henning, that the defendant signed the same immediately under the name of Downing, and also above said blank space as left in said note, and that nothing was said at the time about any collateral being held for said note, and that no agreement was had between said bank, or Graves, or Downing, or either of them, that any collateral was to be held or deposited to secure the note sued on, then, I charge you that, even though you find that the erasure of said words in said note or the drawing of a line through the same with pen and ink was done after Mr. Graves signed said note, that it would not be a ma-

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terial alteration of said note, and if you find the facts that way, the plaintiff would be entitled to recovery."

The eighth assignment is predicated upon error in the charge of the Court to the jury, and, in that, the Court charged the defendant's theory in the case fully in detail and states a hypothetical case to the jury based upon the facts as testified to by the defendant and his witnesses, and does not charge the plaintiff's theory of the case as proven by witnesses for plaintiff and does not detail a state of facts as testified to by plaintiff, and does not state a hypothetical case based upon the facts as proven by plaintiff and, therefore, the charge to the jury is unfair and misleading.

The ninth assignment of error complains that the charge of the Court to the jury was meagre, and did not state the contentions of the plaintiff, and did not state fully his defense and contentions of the plaintiff and therefore was unfair and misleading to the jury.

The tenth assignment of error complains that the charge of the Court to the jury was not full, and did not clearly state the contention of the plaintiff as proven by evidence introduced upon the trial, and that the same is, therefore, misleading in this—"On the trial of the case the plaintiff proved by the witnesses, J. R. Lewis and A. M. Blackwell and R. H. Lipscomb, that the collateral note introduced in evidence was deposited and pledged to said bank in January, 1911, to secure a note due in November or December, 1911, and had at the same time said collateral note due, and being the original note for borrowed money, of which the note was sued on is the second renewal note, and that after said original note for borrowed money became due, and after said collateral note was past due, at a meeting of the finance committee of said bank, whose duty it was to pass upon the solvency of paper held by said bank,

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which committee was composed of the defendant L. R. Graves and the witnesses J. R. Lewis and E. M. Blackwell, that said note and said collateral came before said committee and that said committee known as the finance committee of said bank at that time, decided that said collateral was worthless and of no value and so notified Mr. Graves, the defendant, and that they would not further consider said collateral, and further notified Mr. Graves, defendant in error, that he must pay said note, and that they would look to him to pay said note, and would not look to said collateral any further, and that said note would not be renewed with said collateral as security and that at the time said Graves requested an extension of said note or a renewal to give him an opportunity to get other parties on the note with him, so that he would not have to pay all of the same, and it was proven and contended by plaintiff in error that from the meeting of said finance committee in January, 1912, and before said note was ever renewed, that said collateral was not pledged to or held by said bank as security for said renewal note, and that said note was renewed upon the strength of Mr. Graves signing same, and that said collateral as it is considered or pledged to secure three of said renewal notes, and if said facts, as above detailed were found to be true by the jury, then plaintiff would be entitled to recover because there would have been no material alteration of the note, since no collateral was pledged to secure same, and the charge to the jury does not state the law applicable to said facts, and entirely ignores the contention plaintiff has above detailed, and the same was, therefore, misleading to the jury, although the Court was requested to charge the law, as will be seen from the special request contained in the seventh assignment of error.

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Upon the theory this case was sent to the jury under the charge of the learned trial Judge, the first and second assignments of error are not tenable, and for the simple reason that there is material evidence in the record to support the verdict of the jury under the theory submitted to them by the charge of the Judge; in short, the Judge, in effect, told the jury, if when Mr. Graves signed the notes sued on as security, it had, attached to it, another note as collateral, and that it also contained the words—"Collaterals have been deposited with and pledged to said bank as follows:" and these words—"Collaterals have been deposited with and pledged to said bank as follows"—were stricken out after Mr. Graves signed the notes sued on, the bank could not recover against Mr. Graves irrespective of evidence introduced tending to show, and which, in our opinion, does conclusively and indisputably show, that the collateral note and the only collateral note that was ever hypothecated to secure the loan that R. E. Downing obtained from the bank and for which he gave his note that Mr. Graves signed, was utterly worthless, and that Mr. Graves was so advised when he signed the renewal note of said Downing sued on in this case.

In order to come to a proper understanding of the case in this aspect of it, it is necessary to state some established facts appearing in the record.

On January 21, 1911, R. E. Downing obtained a loan from the Bank of Henning for \$575.00. He executed his promissory notes for said sum on said date, due eleven months after date. This note was signed by R. E. Downing and appellant Graves as his security although the note as given was the joint note of Mr. Downing and Mr. Graves.

At the time this note was executed, W. C. and R. L. Downing executed a note payable to the order of R. E.

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Downing. It was understood and agreed that the note for \$575.00 payable to the order of R. E. Downing by his two brother was deposited with the bank as collateral security for the note given by R. E. Downing and Mr. Graves to the bank for the loan made by the bank to R. E. Downing.

As stated, this note was not paid, nor was anything paid on the collateral note, which matured at the same time the note to the bank matured.

January 24, 1912, Mr. Downing renewed his note to the bank for \$536.65, payable eleven months after date.

Said note is as follows:

"HENNING, TENN., January 24, 1912.

"Eleven months after date, we promise to pay to the order of Bank of Henning, Tenn., at its office (\$536.65) Five hundred and thirty-six and sixty-five one-hundredths dollars for value received, and reasonable attorney's fees and other costs and charges properly incurred in the collection of this debt. As security for the payment of this note, and to secure any other indebtedness that may be in existence at maturity hereof from and to the parties as herein, the following collaterals have been attached thereto."

Following the above words are three blank lines left on the note and below these blank lines the note is signed R. E. Downing, L. R. Graves.

It appears that Mr. R. E. Downing made a payment in this last note, reducing it to \$402.60.

Mr. Robert Lipscomb, the cashier of the Bank of Henning, was introduced and examined as a witness in this case. He was cashier of the bank from its organization and was its cashier when the note sued on was executed. He testified that he had the note first executed by Downing

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and Graves in 1911, and that the note of Mr. Downing's two brothers above referred to for \$575.00 was taken as a collateral to secure the first note executed by Downing and Graves.

As before stated, this collateral note of the two Downing brothers made payable to the order of R. E. Downing's first note to the bank, matured. He then states that that note was renewed on January 24, 1912, and the renewal note made payable eleven months after date.

He testifies that at the time this first renewal note was executed, January 24, 1914, he had no contract with Mr. Graves, but states that Downing wanted the note renewed, and that he told him he would renew it with Mr. Graves as security, and he also told Mr. Downing that they would not accept the collateral. He states that when the note was first renewed Mr. Graves asked him to take care of the collateral note for him, that he might have to pay the note and asked him, the witness, to take care of it for him in case he had to pay it; that it was left there in the possession of the bank; that the collateral note, when the Downing and Graves note was first renewed, was past due. He repeats that the collateral note remained in the bank and that it was in the bank in his possession at the time this suit was brought, for the benefit of Mr. Graves.

He states that he had no contract with Mr. Graves, when the note sued on was executed, to accept said collateral note then two years past due, and that said collateral was not then put up as a collateral.

He states that this note sued on was sent to Mr. Downing at Newbern, Mr. Downing having removed from Henning to Newbern at the time the note sued on was executed.

He states that he did make the erasure on the note sued on, and at this point we had as well copy in this opinion the note sued on:

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"\$402.60.

HENNING, TENN., Jan. 1, 1913.

"Six months after date we promise to pay to the order of Bank of Henning \$402.60 for value received, and all other costs and charges properly incurred in the collection of this debt payable at the Bank of Henning, Tenn. As security for the payment of this and all other liabilities said Bank now holds, or may hereafter hold, against the undersigned as principal, endorser, or otherwise. 'Collaterals have been deposited with and pledged to said bank as follows:' Signed, R. E. Downing, L. R. Graves."

Now, in the note above copied and sued on in this cause, these words—"Collaterals have been deposited with and pledged to said bank as follows:" has a pen mark passing through all of them.

As will be noticed, after the following words—"Collaterals have been deposited with and pledged to said bank as follows:" there are five blank lines on the note, and the names R. E. Downing and L. R. Graves, one under the other, are signed on two of these blank lines.

Mr. Lipscomb testifies, and this is admitted in the testimony of Mr. R. E. Downing, that the note sued on was sent to him at Newbern. It is admitted that Mr. Lipscomb, the cashier, when he sent the note to Mr. Downing at Newbern to be executed, requested him to deposit or furnish additional security. He states that he wrote Mr. Downing to the effect, that Mr. Graves had been after him for some time to try and get some additional security on it. That he did not think the two brothers' notes were good. This letter does not appear in the record, but its contents are substantially proved.

He states that the words aforesaid, apparently erased by a pen line drawn through them, mentioned that the note was sent to Mr. Downing so that he could send addi-

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tional security to protect Mr. Graves, if he could, and that he was working in the interest of Mr. Graves, trying to protect him.

He states that when the note came back from Mr. Downing from Newbern, there was no additional security, and that Downing had signed above the additional space where the collaterals were attached. He states that when the matter came in this shape he erased the words before stated. "Collaterals," etc., before Mr. Graves signed it. Mr. Graves denies this, and says the words aforesaid were in the note at the time he signed it, and that the collateral, that is, the original \$575.00 note, then past due for more than a year, was attached to it at the time he signed it.

The proof clearly shows that Mr. Graves did not sign this note sued on until about the 22d or 23d of January. Lipscomb states that the note sued on was mailed from Newbern on the 14th of January and the letter returning the note was introduced below in evidence, but it appears to have been lost.

He states that he ran his pen through the words before copied after the note came back to him from Newbern, and he states that he ran his pen through the words to show that they did not hold any security for this note as a part of it, as to Mr. Graves.

He was asked if he had any contract or agreement with Mr. Graves, that the bank would take this note which was two years past due and hold it as collateral to secure the note sued on, and he stated emphatically that the bank did not.

He also stated that they had no agreement that they would exhaust the collateral note before they would hold Mr. Graves.

It appears, beyond all dispute in the record, that this note sued on, or rather, a renewal of the note that had been

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first executed in January, 1911, as before the finance committee of the bank when the first renewal note was executed. The cashier states that the bank had this matter under consideration in January, 1912, when the first renewal was made. The finance committee of the bank at that time, according to the testimony of Mr. Lipscomb, and of two others, was Mr. Barfield, Mr. Alston, Mr. J. R. Lewis, Mr. E. D. Blackwell, and appellant Graves. Mr. Lipscomb, the cashier, testified that he was present when this matter was taken up in the meeting of the finance committee, and that Mr. Graves was present. He was asked to state what was said then and there. He replied that Mr. Blackwell told him, Mr. Graves, that he had just as well get ready to pay the note, and that Mr. Graves replied that he wanted Robert, that is the cashier, to wait a few days on him; that he wanted to get some of these good Baptist brothers on it to help him out, and that Mr. Blackwell told him that R. E. Downing's note was not any account and that they would not consider it as collateral. He repeats that Mr. Graves was present at that time and at that meeting of the finance committee, and was a member of it.

Mr. Blackwell testified in the case in behalf of the bank. He was a member of its finance committee. He lived at Henning. He was a stockholder and a director in the bank, and, as before stated, was a member of its finance committee, from the organization of the bank. He stated that as a member of the finance committee, it was a part of his duty to pass upon the paper, or to go over the paper, in the bank, that is, the loans made. He stated that upon one occasion the committee passed upon a note in there signed by Downing and Graves, with which a collateral note signed by W. S. and R. G. Downing was attached. He states that this was in January, 1912. He states that

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Mr. Graves and Mr. Lewis were present, and that the cashier, Mr. Lipscomb, was present at that meeting of the finance committee.

He was asked to state to the jury what was said there at that time with reference to this Downing and Graves note and collateral, if anything. His reply was, "Well, I told Mr. Graves that we did not consider the Downing note worth the paper it was written on, or Downing either, and we looked to him for it, and he asked us to give him time to go around—well—the very words he used, he said, 'I understand and know that it is no account.' He says, 'You give me time to go around and get some of these Baptist brothers to go on it.' Then counsel of Mr. Graves interposed this question, 'What is that, I did not understand?' Then Mr. Blackwell answered, 'Well, he said that he knew that the paper was no account, and that he was bound for it, and for us to extend him time to get around and get some Baptist brothers to go on the paper and help him pay it.'"

It appears that Mr. Downing, the maker of the note sued on, was formerly pastor of the Baptist Church at Henning. He states that the collateral note was past due at the time the renewal note of 1912 was executed. Mr. J. R. Lewis was also a stockholder and director in the bank, and, also, a member of its finance committee. He testified that they had a meeting of the finance committee in January, 1912; that he was present at said meeting; that Mr. Blackwell and Mr. Graves were present and Mr. Lipscomb, the cashier. He was asked to state to the jury what was said there at that meeting of the finance committee with reference to this Graves and Downing note, and collateral. His answer was, "Why, somebody remarked there, someone I do not remember which one, to Mr. Graves, that he had just as well go ahead and pay it, that he would have to pay."

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Q. "What did he say, if anything?"

A. "Well, he said he wanted Robert to hold off on it awhile, that he was going to try to get some of the good Baptist brothers there to help him out."

Now, it is true, as before stated, that the original loan to Mr. Downing, the Baptist preacher, was reduced from \$575.00 to \$402.60, the note sued on.

The testimony is quite clear on the part of the bank, that at the time the note sued on was executed it was renewed for six months for the balance due at the request of Mr. Graves.

Now, Mr. Graves testifies, as before stated, that at the time the note sued on and signed by R. E. Downing and himself, the words, "Collaterals have been deposited with and pledged in said bank as follows:" were in the note unerased when he signed it.

It will be noticed that Downing and Mr. Graves signed the note upon the blank space left for the designation of collaterals after the words above indicated, which were erased by the cashier.

There is evidence in the record tending to show that all these notes of Downing and Mr. Graves were kept in the bank and that the collateral note of the two Downing brothers given when the first note was executed were all the time kept in the bank. That the two Downing brothers, who executed the collateral note were living in Texas, is undisputed. That they were insolvent, we think, is clearly established by the evidence of the Rev. Mr. Downing, the principal on the note sued on.

Reverend Mr. Downing admits that when the note sued on was sent to him at Newbern to execute he was requested by Mr. Lipscomb, the cashier, to give additional security. As before intimated, the two Downing brothers,

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whose collateral note was originally hypothecated with the bank, lived in the State of Texas, and were insolvent, we think, as stated, is established by the testimony of their brother, Rev. R. E. Downing. Rev. Mr. Downing was not entirely accurate in his original remembrance of things. He first swore on the trial before the Justice of the Peace that he signed the note sued on in the Bank at Henning; but when his letter to Mr. Lipscomb, the cashier, of date January 14, 1913, was exhibited to him he had to change his testimony in that respect. As before stated, Rev. Mr. Downing, by the fair inference to be deduced from his testimony, shows that his brothers who executed the collateral note were insolvent.

He was asked and stated that one of his brothers who executed the collateral note, was in poor health, and he was asked if he had any property out of which the note could be made, and his reply was, that, if he had any property out of which the note could be made, he did not know it. That he did not know what either one of his brothers signing the collateral note had. He was asked if he did not testify before the Justice that they did not have any property, and his answer was, "No, sir, I think not." He stated that he did not know their financial condition.

He was asked when was the last time he saw them. His reply was, "I have not seen them, one of them, I have not seen since Christmas, 1911. He stated that they lived in Dallas, Texas, the last he heard of them. He was asked how long it had been since he had heard of them, and his reply was that he had not heard from them since this last May a year ago. He stated that at the time he last knew them, or heard from them, they did not have any property out of which the collateral note could be made, that he knew of.

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In view of this evidence, we think that the trial Judge should have squarely submitted to the jury the proposition, as to whether or not the note sued on was renewed or extended at the request of Mr. Graves, and whether or not he was in the meeting of the finance committee at which it was determined, or stated, that the collateral note was worthless, and that he had as well go ahead and make arrangements to pay it.

As a general rule, an alteration of a written instrument is something done upon it changing its meaning or language: *Budges v. Winters*, 2 Am. Rep., 598; *Palmer v. Sargent*, 25 Am. Rep., 479.

Alterations of instruments may be either material or immaterial.

A material alteration of an instrument is one, to use the language of some eminent Courts, "which causes it to speak a language different, in legal effect, from that which it originally spake." *Wheelock v. Freeman* (Mass.), 23 Am. Dec., 674; *Murray v. Keinsing*, 64 Conn., 78; *Morrill v. Otis*, 12 N. H., 466.

The modern rule announced by the English Courts and, also, generally speaking, by the Courts of America, is, that only material alterations vitiate or invalidate an instrument: *Parson on Con.*, 22, 716, 720; *Cushing v. Field* (Me.), 35 Am. Rep., 293, cases cited; *Herrick v. Wallis* (Mass.), 6 Am. Dec., 169; *Herrick v. Baldwin* (Minn.), 10 Am. Rep., 161; *Miller v. Read* (Pa.), 67 Am. Dec., 459; *Blair v. Bank*, 11 Hum., 84, cases cited.

And, certainly it would be a harsh rule that holds that an immaterial alteration, innocently made, invalidates an instrument.

It is well settled, of course, if the promises in an instrument make a material alteration in it after its execution, without the consent or authority of the promisor, it

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will invalidate the instrument in the hands of the promisor, or his privies, and no recovery can be had on it either in its altered or original form: *Toomer v. Rutland* (Ala.), 29 Am. Rep., 722; *Bank v. Clark* (Iowa), 33 Am. Rep., 129; *Savings Bank v. Stowell* (Mass.), 25 Am. Rep., 67; *Neff v. Horner* (Pa.), 3 Am. Rep., 555; *Crockett v. Thomason*, 5 Sneed, 342. *Taylor v. Taylor*, 12 Lea, 714.

It is likewise settled by the weight of authority, as we understand them, that if the alteration is material, it is a matter of no importance, whether it is or is not prejudicial to the promisor, and, as held by some authorities, even though apparently the alteration operate in favor of the promisor, it will invalidate the instrument: *Coburn v. Webb* (Ind.), 26 Am. Rep., 15; *Humphreys v. Guilow* (N. H.), 38 Am. Dec., 499; *Woodworth v. Bank* (N. Y.), 10 Am. Dec., 239.

A material alteration, even though made without any fraudulent intent, will invalidate the instrument, is held by some authorities: *Toomer v. Rutland* (Ala.), 29 Am. Rep., 722; *Hall v. McHenry* (Iowa), 87 Am. Dec., 451; *Fay v. Smith* (Mass.), 79 Am. Dec., 752; *Lewis v. Schneck* (N. J.), 90 Am. Dec., 31; *McDaniel v. Whitsett* (Tenn.), 33 S. W. Rep., 568.

It appears to have been held in Maine, that if a material alteration in an instrument was innocently made, without any fraudulent or improper notice, although it was unauthorized, it would not vitiate it: *Milberry v. Storer*, 46 Am. Rep., 361; *Crosswell v. Labree*, 10 Am. St. Rep., 238.

And, practically the same rule seems to have been announced in New Hampshire. But the rule supported by the weight of authority is as above stated, and it is strictly enforced in favor of sureties: *Sturgis v. Williams* (Ohio), 75 Am. Dec., 473, cases cited.

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The reason for the rule is, that a material alteration of the instrument destroys its identify, or, in other words, as altered, it is not the contract of the party not consenting to the alteration, and the policy of the rule is to prevent the tampering with written instruments: *Wood v. State*, 6 Wall (U. S.), 80; *Mossman v. Werges*, 112 U. S., 139; *Wallace v. Jewell* (Ohio), 8 Am. Rep., 48.

We need not, of course, cite authorities in support of the rule, that a material alteration made in an instrument with the consent of the obligor will not vitiate it. The ancient doctrine upon the subject of the alteration of instruments has been materially relaxed and modified by modern adjudications. 1 Greenleaf on Evidence, section 566; *Blair v. Bank*, 11 Hum., *supra*.

"The term 'Alteration,'" said Judge McKinney, quoting from Greenleaf in the last above-styled case, "is at this day usually applied to the act of the party entitled under the deed or instrument, and imports some fraud or improper design on his part to change its effect."

"Further," said Judge McKinney, "if the act done upon the instrument does not change its meaning or language, or give it a different legal effect, and no one can be mislead or prejudiced thereby, it is not an alteration in the sense of the law."

Now, there is not a particle of evidence in this record that the cashier of the bank in this case, in running his pen through the words before stated had any fraudulent intent, or intended to prejudice the rights of any party to the note.

As before stated, consent of an obligor in an instrument to a material alteration in it will not vitiate it, and this consent may be express, or it may be implied either through custom or the acts of the parties as by leaving blank spaces in the instrument for the insertion of words: *Wood-*

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worth v. Bank (New York), 10 Am. Dec., 239; *U. S. v. Nelson*, 2 Brock (U. S.), 64; *Stewart v. Bank*, 40 (Mich.).

If it is permissible to insert words in order to make the instrument carry out the intention of the parties, it is certainly equally competent to erase words inserted through an innocent mistake, in order to conform the instrument to the intention of the parties. In short, we think that the weight of authority, as well as reason, support the rule that an alteration of an instrument which makes it conform to the intention of the parties, will not vitiate it.

An interesting case analagous and applicable to the question in hand is that of *Hanson v. Crawley*, 41 Ga., 303. It was an action upon a promissory note, changed by the principle at the suggestion of the payee after its execution, without the knowledge of the survey, by inserting a clause making it payable in gold. The surety filed a plea of *non est factum* upon the alteration in this line released him, as did Graves in this case. The payee of the note claimed that the change was made to correct a mistake and conform the instrument to the agreement of the parties. The Court said: "Had the fact been that the original contract was a specie contract, and the security knew it, and became security with that understanding, the mere fact, that, under a mistake of law, they left certain words out of the contract which were afterwards put in by the principle, would not release the surety."

It is well settled, as we understand the cases, that an alteration, to be material, must be in a material part of the instrument, and affect the rights and liabilities of the parties to it." *Coburn v. Webb*, 26 Am. Rep., 15; *Wheeler v. Foreman*, 23 Am. Dec., 674; *Draper v. Wood*, 17 Am. Rep., 92; *Bank v. Shaffer*, 31 Am. Rep., 394; *Kin-*

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cannon v. Carroll, 9 Yer., 11; *Blair v. State*, 11 Hum., *supra.*; *Newell v. Mayberry*, 23 Am. Dec., 261.

Various other authorities could be cited.

So, it has been held that if words so added or erased are merely *descriptio personae*, the change does not amount to a material alteration. *Hayes v. Matthews*, 30 Am. Rep., 226.

So, it has been held that blanks left in writing of whatever description, except in cases prohibited by the statute of frauds, may be filled up under mere parole authority. We do not deem it essential to insert authorities under this last proposition.

Under these authorities, and under the law as above stated we think that if Mr. Graves were present when the finance committee of the bank met in January, 1912, when the first note of Rev. Mr. Downing was renewed, and it was stated that the collateral was worthless and that Mr. Graves would have to pay the note and he asked for a delay in order that he might get additional security upon the note and this delay was granted, and it was understood at that time by the bank and by Mr. Graves, that the collateral was worthless, and if it appear that the renewal note sued on was sent to Rev. Mr. Downing to be signed and for additional security to be given for the benefit of Mr. Graves, which was not done, and if it further appear that the original collateral note was kept in the bank for the benefit of Mr. Graves and is still in the bank, and if it appear that the makers of the collateral note were insolvent and that nothing could be made out of them, then, under such a state of facts, the erasure of the words complained of, whether made before or after Mr. Graves signed the note sued on, would make no difference as to his liability.

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If correct in this view, it follows that the proposition should have been squarely submitted to the jury as to whether or not when the first renewal note of Rev. Mr. Downing was executed and signed by Mr. Graves, it was understood by Mr. Graves that the collateral was worthless, and if so then the erasure of the words complained of would not affect the liability.

The result is that for the failure of the Court to charge the law as above stated and substantially as requested in the seventh and eighth assignment of error, the judgment of the Court below will be reversed and the case remanded for a new trial.

Mr. Graves will pay the costs of the appeal.

LOUISVILLE & NASHVILLE RAILROAD V. TOM HOBBS.

Affirmed by the Supreme Court at Nashville, 1914.

1. RAILROADS. *Fencing act. Contract exempting railway company from liability for stock killed.*

While under some circumstances a railway company may enter into a contract whereby an adjacent landowner obligates himself to maintain gates or bars at private crossings, such contracts are looked upon with disfavor, and should be strictly construed.

2. SAME. *Description.*

Such contract, to be valid, must contain a description of the place at which the gates or bars are to be maintained. A contract which does not refer to the civil district nor to objects such as would enable a Court or an official to apply the description is invalid.

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3. SAME. *Long continued abandonment of fence.*

A railway company which for a period of several months knowingly permits a gate or the bars at a private crossing to stand open or down continuously, should be treated as having an unfenced track at that point.

4. SAME. *Extent of exemption for liability to owner of land.*

A contractual exemption from liability to landowner for the killing of stock on the railway tracks cannot be extended so as to free the railway company from liability to a party who is merely pasturing a horse in a remote field by permission of the subtenant of the landowner.

5. SAME. *Action of damages for killing stock. Proof.*

It is incumbent upon the owner of stock injured upon an unfenced track to prove by a preponderance of the evidence that the animal was struck by a moving train of the company; but this may be established by circumstantial evidence.

FROM GILES COUNTY.

Appeal in error from the Circuit Court of Giles County.
W. B. TURNER, Judge.

E. E. ESLICK and DAN ESLICK for Plaintiff in Error.

WILLIAM SMYTHSON for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

HOBBS recovered a verdict and judgment of \$250.00 for the alleged wrongful killing of a mare by plaintiff in error in Giles County. In the warrant the cause of action was stated as that of wrongful killing. This, of course, embraced killing on an unfenced track. There was no pretense that the railway company intentionally or reck-

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lessly ran over the animal; so that plaintiff Hobb's right of action must be determined under the Railroad Fencing Act.

The railway company excepted and perfected its appeal and is here assigning errors which need not be treated *seriatim*. The third, fourth, fifth, sixth, seventh, and eighth assignments of error were predicated upon refusal of the trial Judge to give in charge to the jury certain special requests based upon an alleged contract or deed made with the railway company by Mr. J. L. Buford in June, 1906. It was the contention of the railway company that its track through the field in which Hobb's mare was killed was inclosed by a substantial and lawful fence except that an aperture or gate left at a private crossing of Mr. Buford's was occasionally or generally opened because of the fault of Mr. Buford or his tenants or his employes; that this private way was for the convenience of Mr. Buford and his tenants, and that for this reason and also by contract the railway company was excused from liability for injuring stock upon this land regardless of the party in whose possession the land at any particular time was.

This question has given us a great deal of concern. We have reached the conclusion after mature deliberation that as against defendant in error the contract was not available as a defense or a release of damages. Our reasons for reaching this conclusion shall be briefly stated. First, the description is not definite enough. It is true that the instrument calls for Giles County, Tennessee, but it does not state the civil district of that county in which the land lies. We take judicial notice that Giles is divided into numerous civil districts. No effort is made to show that Mr. Buford's place was generally known or possessed any peculiarity such as would bring it within the rule of *Dough-*

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erty v. Chestnutt, 86 Tenn., 1. Reference is made to the fact that the mileage posts along the railway, to wit, 257 and 258, are sufficient indicators of location. This will hardly do. There is no language from which it could be inferred that any particular number of feet were on one mile and any number on another. In the case of *Railway v. Webster*, 106 Tenn., 586, the number of the mile on which Webster's land lay was given, but this was not deemed sufficient.

Secondly, we are not disposed to look with favor upon any contract by means of which a railway company transfers to landowners the responsibility of keeping and maintaining the fences which the law says shall be erected in the interest of public safety: *Railroad v. Crider*, 91 Tenn., 487. This is a police regulation of most beneficent scope; and the railway company should be relieved of the duty of maintaining these barriers in clear cases only. If fences can be erected with gaps which are never closed, the law would become a dead letter insofar as the protection of the public is concerned. We recognize the fact that a railway company and an adjacent landowner may enter into a contract whereby the latter agrees to maintain fences, especially gates and bars at crossings: *Greer v. Railroad*, 104 Tenn., 242. But the holding of railway companies responsible for failing to *see* that barriers are maintained may sometimes be wholesome.

In the case at bar it is clearly established that the gateway at the private crossing used by Mr. Buford, or at least found on his farm, had stood open practically for eight or ten months to the knowledge of numerous employes of the railway company. The evidence is cogent enough to warrant the inference that this gap in the fence was known to every servant who had anything to do toward supervision or inspection of the railway trackage. And

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yet, this gateway stood open, unobstructed and just as free for use by man and beast as if there had been no fence whatever. This was virtually an abandonment by the railway company of its fence through Buford's farm, and this Court would not do violence in determining the liability of the railway company just as if no fence had ever been erected. But we do not place our decision upon this ground wholly. We are of opinion that the instrument submitted was simply a personal covenant of Buford's, and that it was not broad enough in its scope to include in its relinquishing provisions men who sustain the relation of Hobbs to the land or to the situation. We are not to be understood as holding that a tenant cannot be bound by an agreement entered into by his landlord with a railway company. We simply decide that Hobbs was not in such privity with Buford as to be bound by any waiver into which Buford may have entered. Buford moved from the farm to Nashville several years ago. He rented the land at different years to different people. One Ed Hardy was his tenant during the year in which Hobbs' mare was killed in 1913. One Paulk had by contract or purchase become the possessor of a certain field on this land, and it was with Paulk that Hobbs entered into a contract or from whom he obtained permission to pasture the mare that was killed. Thus Hobbs was the mere licensee of a man who had sub-rented from Hardy, who had rented from Mr. Buford. The field into which the mare was turned was not adjacent to the railroad; that is, there was another field between it and the right of way of the railway company. In order to reach the right of way the mare had to work her way out of this far-removed field and then go through the field adjacent to the right of way and pass on to the railroad through the opening which we have stated as having been virtually unobstructed or unbarred for months before this.

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While not decided in this State, we do not think that Hobbs was a tenant or sub-tenant of Buford, and that he could not be held bound by this agreement, conceding that Buford and his tenants were bound thereby. It was so held in a very interesting case of *Warren v. Railroad Company*, 41 Iowa, 484. It was admitted that Hobbs had no knowledge of the existence of his contract, nor was any effort made to prove that either Hardy or Paulk was aware of it. It was shown at the trial that all parties looked upon the contract as not having been registered. It was subsequently developed that the agreement had been registered, but in a trust deed book. We are of the opinion that this was not the proper record in which to have the instrument recorded, even if it should be treated as obligatory.

For the foregoing reasons we are of the opinion that the contract was not available and hence that the Court for many reasons was not in error in declining to submit the special requests. This disposes of the third, fourth, fifth, sixth, seventh and eighth assignments of error. Those parts of the contract under consideration which should be set out here for clearness are as follows:

"This contract—witnesseth, that whereas, J. Lawrence Buford, first party, of the county of Giles, State of Tennessee, the owner of certain land fronting 6,670 feet more or less on the east and west side of the railroad on mile Nos. 257 and 258 of the N. & D. Division of said railway company, lying in the State of Tennessee, county of Giles, Civil District No. —, and whereas the L. & N. R. R. Co., the second party, which is to build and maintain perpetually under the conditions and upon the considerations hereinafter stated, a fence on the land of said party on the line of said railroad 33 feet distant from the center line of the main tract as shown on the following sketch

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(no sketch shown, copied or filed or ever shown to have been made) now therefore the second party hereby agrees to furnish on the ground wire and staples and posts for said fence, and second party will build said fence at its own cost and expense. It is further agreed that repairs to said fence as they appear to be needed shall be made on the basis the second party furnishing the wire and staples and posts on the ground on notice from the first party, and the first party, his heirs and vendees receiving said material and doing the work. It is further agreed—that there shall be maintained perpetually on the land of the first party and the first party agrees to and does release said second party from all claims for damages by reason of the stock or cattle of the first party or any stock in its charge straying upon the railroad and being killed or injured. It is further agreed that when a gate or gates are constructed in said fence it shall be the duty of first party to keep said gate or gates closed.”

Then follows a provision that the contract constitutes a covenant running with the land. As to this latter feature see *Webster v. Railroad Co.*, *supra*. It will be noticed that exemption from liability for killing stock is limited to those of Buford and those in his charge.

The basis of the ninth, tenth and eleventh assignments of error is a series of propositions embraced in the charge of the Judge in substance that if the railway company had negligently allowed the gates to remain open constantly, or if the gates were habitually left open, to the knowledge of the railway employes, or if the gates were open in such way and at such intervals as that the railway servants would have become aware thereof in the ordinary course of events, then the railway company could not rely upon the Fencing Act as immunity for killing the animal. We are of opinion that there was no reversible error in this charge:

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Greer v. Railroad, supra. It is true that if the contract referred to had been treated as valid and binding and if Hobbs came within its provisions, then these instructions would have been inapplicable and unsound. But if we are right in our conclusion that the contract was not available as a defense, then the instruction given cannot be successfully assailed.

The first assignment of error need not be noticed, as it is not an appropriate one for this tribunal. In the second assignment it is said that there is no evidence to support the verdict. Particularizing, learned counsel for the railway company say that there is absolutely no evidence that Hobbs' mare was struck by a moving train, car or engine of plaintiff in error; and it is thence argued that there was no liability, citing *Railroad v. Tiernan*, 102 Tenn., 704; *Jones v. Railroad*, 104 Tenn., 119, and other cases. It is beyond dispute that the party who sues for wrongful killing of animals because the track was not fenced or kept fenced must prove that they were killed by collision with a moving train or car. But we apprehend that this does not destroy the rule of circumstantial evidence. It is universally held that the party suing for injuries to an animal may show by circumstances that it was struck by a moving train. We are of opinion that the circumstances of this case were sufficient to carry to the jury the question as to whether the animal was struck by a moving train running on the track of plaintiff in error. The animal escaped from her enclosure in the nighttime. She was found the next morning alongside and very close to the railway track in Buford's field, badly bruised, and broken up, with a young colt with which she was in foal protruding from her. All the witnesses describe her body as being badly torn up. It is also shown that there was blood along the track. To say that anything else than a

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moving train killed her would be a remarkable assertion. She could not have fallen and so hurt herself. She could not have been shot or stabbed and been found in her condition. No one could have taken a club and beaten and bruised her in such way as she was treated, nor could anyone have slaughtered her at another place and dragged her to the track. But it is said that there was no evidence that any train passed over the track. Of course we do not know this absolutely; but the lower Court knew and this Court knows that the L. & N. is one of the great railroad companies of the South, and that the track through the Buford farm is its main line, and that trains are constantly passing up and down it. This Court knows that no other instrument of danger capable of producing such injuries as were received by this mare was on the track or the right of way.

It is earnestly insisted that this question has been several times decided adversely to defendant in error by the Supreme Court, particularly in the Hackney case. We are of opinion that the Hackney case and the dog case mentioned are not entirely in point, for the reason that they were statutory precaution cases, in which it is incumbent upon the plaintiff always to show that the party or animal appeared on the track in front of a moving train. It is not necessary to do that in an action based upon the Fencing Act: *Railroad v. Henry*, 3 Tenn. C. C. A., 184. All that has to be shown is that the animal was on the track and was injured by collision with a train that was moving.

Our basis for this holding is mainly the doctrine of judicial estoppel. It may be safely assumed that Hobbs could have proven beyond controversy that after his mare entered upon the right of way a number of trains passed; it is not unreasonable to presume that he could have established beyond a reasonable doubt the fact that the mare

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was killed by moving cars. Doubtless his learned attorney thought he had made a *prima facie* case. If so, he had the right to rest until his evidence was assailed. As a matter of fact, the railroad never controverted the fact of collision so far as we can gather from the record. The whole defense of the railway company seemed to have been predicated upon the written contract. This seems to have been the chief point of controversy. It was not unnatural for counsel for Hobbs to think that the killing was impliedly confessed. Having failed to make an issue of this point, there is some basis for the application of the doctrine of judicial estoppel. In other words, the conduct of learned counsel for the railway company, always eminently fair, and in this instance without any taint of impropriety, clearly induced the other side to think that the point of controversy lay in another direction. We must not be understood as intimating that a plaintiff is not required to make out his case. He is onerated with this burden. But when it comes to an administrative question the attitude or the conduct of the other side at the trial may be of evidential and juridical value.

We overrule all the assignments of error and affirm the judgment of the lower Court with costs.

Baker v. State of Tennessee.

D. W. BAKER ET AL. V. STATE OF TENNESSEE.

Affirmed by Supreme Court at Knoxville, 1915.

NUISANCE. Possession of liquor license. Presumption rebuttable by holder.

The presumption which arises from the possession of a Federal license that the holder is engaged in the illegal sale of liquor may be rebutted by the defendant by his own explicit uncontradicted testimony that he had not sold intoxicants on his premises, and had no knowledge of such sale.

FROM KNOX COUNTY.

Appealed from Circuit Court of Knox County. Von
A. HUFFAKER, Judge.

J. R. PENLAND and L. H. MYERHOFF for the State.

WEBB & BAKER for Defendants.

MR. JUSTICE MOORE delivered the opinion of the Court.

THE bill in this case was filed by the State of Tennessee on the relation of Attorney General against the defendants, charging them with maintaining a nuisance at No. 509 Chamberlain Street, in the City of Knoxville, in that the said Baker was, on the first of July, 1914, engaged in the sale of intoxicating liquors and beverages in the house named above. This is the substance of the charge against Baker, but as to the defendant, the Holston Realty Company, it is charged that it rented the building to Mr.

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Baker to be used for the purpose of conducting, maintaining and engaging in the sale of these liquors therein, and with its knowledge, consent and permission. It is charged in the petition that about the first of July, 1914, defendant Baker procured a Federal revenue license, authorizing him to sell intoxicating liquors in this building. The bill prayed for a temporary writ of injunction as provided in what is called the Nuisance Act, passed at the second extra session of the Legislature of 1913, to enjoin and restrain these defendants from conducting said business in said building; and upon the hearing of the cause, it was sought to have an order or decree rendered by the Circuit Court abating the nuisance so conducted and carried on in said house, and that the means, appliances, fixtures, etc., used in conducting said business be sold under the orders of the Court, or such of it as might lawfully be sold, and the proceeds applied as provided in the Act of the Assembly. It was asked that the injunction prayed for be made perpetual at the final hearing of the cause.

No temporary injunction was in fact issued, although notice was given as provided by the statute, that application for such an injunction would be made on the 25th of July, 1914. The defendants answered the petition and denied each and every allegation therein, except that defendant Baker admitted that he had a United States revenue license as a retail dealer in malt liquors, but that he had no such license as authorized him to retail spirituous or intoxicating liquors.

We do not deem it necessary to state all the allegations or charges in the bill, nor the denials contained in the answer. The defendants insist that the business conducted by Baker was that of a soft drink stand, wherein he sold only soda pop and a beverage called maltz, and manufactured by the East Tennessee Brewing Company, situated

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near Knoxville, and that it was entirely harmless and non-intoxicating. These were the only drinks or beverages that the defendant sold in the building mentioned, according to the statements in the answer.

On the date when the application for the temporary injunction was to be heard, the relator and defendants, being ready for trial, the case was heard by the learned Circuit Judge without a jury, and after the evidence was all introduced, he adjudged the defendants both guilty as charged in the petition, ordered the nuisance abated as provided in the statute; and from his orders and decrees made in the case, the defendants have prosecuted an appeal to this Court and assign his actions in the matter as error.

The relators, on the hearing of the case, introduced certified copy of a record from the United States Internal Revenue Collector's office, showing that the defendant Baker, on July 1, 1914, took out a revenue license to sell malt liquors from that date to June 30, 1915, for which he paid the sum of \$20.00. After the introduction of this license, or record, the relator then introduced a deputy sheriff who served the process in this case, who testified that No. 509 Chamberlain Street, in Knoxville, was located within four miles of a school house. This deputy stated that when he served the process in this case, there was only a counter along the side of the wall about the ordinary height; that he saw an ice box, and that there was not anything very much there. He only saw one man in there beside the defendant Baker, and he was standing talking. He saw some unlabeled bottles, but did not know what was in them, and some of them were empty. He did not see any beer there, but the empty and unlabeled bottles were the shape and size of beer bottles.

The foregoing is all of the evidence offered by the relator to make out the case stated in the petition, that is,

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that the defendant Baker was engaged in the sale of intoxicating liquors and beverages in the building mentioned therein. This evidence would make a *prima facie* case against Mr. Baker that he was engaged in the sale of liquor in violation of the Nuisance Act. When the relator had made this proof he then rested, when Mr. Baker offered the evidence of some chemists who had analyzed the beverage called maltz, and each of whom stated there was not one-half of one per cent of alcohol in that beverage; and, further, that a man could not drink enough of it to become intoxicated. The manufacturer of this beverage was also examined as a witness by the defendants, and they testified to the same effect as the chemists, that is, that there was not as much as one-half of one per cent of alcohol in the beverage called maltz, and that a person could not be made intoxicated by drinking it. The defendant Baker then went upon the stand, and, in a clear, positive, and, apparently very frank way, testified that he had never kept intoxicating liquors in that building at any time; that he started the business about the first of July, 1914, to sell soft drinks, and had never kept any kind of drinks for sale except the beverage known as maltz, and soda pop. He also stated that he had no fixtures, or barroom appliances in the building, and did not run and operate a barroom therein. He stated that he had never had any intoxicating liquors of any character in the building, and certainly had never sold any before or after the petition in this case was filed.

The relator failed to show that any sale was made, or that any intoxicating liquors were ever kept in this building, or that any barroom fixtures of any kind, except the counter, were kept there by the defendant Baker. In fact, relator relied, to sustain the petition, altogether on the government license held by the defendant Baker. Baker, in

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explanation of how he happened to have the license, stated that, a short time after he opened business in said place, some officers from the internal revenue department advised him that he had better take out the license in order to insure him against any trouble from the internal revenue officers, and while he did not think he was compelled to have a license under the law, he preferred not to take any risk of prosecution by the government, and, acting upon the advice of these officers, secured the license, not with any intention or purpose of selling intoxicating liquors, or as an authority to him to run and operate a saloon in said building. Baker, in his testimony stated that the beverage called maltz, was not intoxicating, and that he had had it analyzed in order to see whether it was or not, and that it contained less than one-half of one per cent of alcohol, and that he bought it from the East Tennessee Brewing Company after it had positively assured him that it was non-intoxicating, and that no one could drink enough of it to make him drunk.

On this testimony, the learned Circuit Judge held that the evidence of the defendant did not rebut the presumption arising from the possession of a government license, and a very long and able argument is made by the learned Attorney General to show that the evidence of the defendant himself is not enough to rebut this presumption, and the case of *Brinkley v. State*, 125 Tenn., 373, is cited to sustain his position.

This Court has had *Brinkley v. State* before it quite often, and especially in passing upon a large number of nuisance cases at its last term at Jackson. It is unnecessary to analyze that case, for the case the Supreme Court had before it then, is not the case now under consideration. In that case, Mr. Brinkley did not testify in his own behalf on the trial of the cause, and the evidence

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he offered to rebut the presumption arising from the possession of a government license, being purely negative, was held by the Supreme Court not sufficient to rebut the presumption. The Supreme Court in its opinion in *Brinkley v. State*, commented on the fact that the defendant did not testify himself, and that no one who had charge of the business of the defendant and who conducted the different sales made for him, was offered as a witness in his behalf. The implication in the opinion of the Supreme Court in that case, is that the defendant might have gone upon the stand and rebutted the presumption that arose from having a government license, but that he did not choose to do so.

In this case, the defendant Baker is a competent witness, and it is not shown that he had any other person in his employ; and if he cannot by his own testimony, rebut the presumption that arises from his having a license, then he is certainly in a bad fix, for, in a case like this, the defendant would have no means whatever of rebutting this presumption. The defendant being the only person employed in the house, and having no one to assist him, it would be impossible for him to make proof that he was not guilty of the charge. He might, as Brinkley did, find a dozen men who would testify that if there was any whiskey sold in his house their neither saw or knew it, and yet, as held by the Supreme Court, that would not rebut the presumption.

We think, when the defendant went upon the stand and testified that he never, at any time, kept or sold intoxicating liquors or beverages, as charged in the petition, and when he showed by proof that the beverage he did sell was non-intoxicating, he then rebutted the presumption that arose by reason of his having a government license. Being a competent witness, he had the right to go upon

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the witness stand and explain how he happened to have possession of a government license, and his explanation seems reasonable as well as plausible, and there is no proof in this record that reflects upon his integrity or general character or reputation; and in the absence of such proof, he is presumed to be a man of good reputation and character. It was certainly competent for him to go upon the stand and show to the Court that there was no foundation for the presumption, by testifying that he did not keep liquors, or sell liquors in this house, and that he did not start the business for that purpose; and having done so, we are of the opinion that he has rebutted the presumption that the license creates against him, and that the orders, judgments and decrees of the learned trial Judge were error, and they will be reversed and these proceedings dismissed at the cost of the State.

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H. C. MOORE v. INSURANCE COMPANY.

Affirmed by Supreme Court at Nashville, 1914.

1. FIRE INSURANCE. *Premium note. Failure of consideration.*

A note given for the premium of a fire insurance policy is not collectible if the risk never attached. Such note is without consideration.

2. SAME. *Estoppel of insured to deny consideration.*

The insured who represented to the company that he was the unconditional owner of property which in reality belonged to his wife but of which the company was ignorant, is estopped to defeat collection of a note given for the premium upon the ground that there was failure of consideration in that he was not the owner of the property.

FROM LINCOLN COUNTY.

Appealed in error from Circuit Court of Lincoln County. EWING L. DAVIS, Judge.

HOLMAN & HOLMAN for Plaintiff in Error.

SAM C. TIGERT for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS was an action commenced before a Justice of the Peace of Lincoln County, against the plaintiff in error, Hugh C. Moore, to recover upon a note executed by said Moore for \$96.00, payable to it, which note was executed in part payment of the premium on a fire insurance policy

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issued by said insurance company, insuring the said Moore against loss or damage by fire and lightning for a period of five years, upon the following described property: "1,000.00 on dwelling house; \$500.00 on barn No. 1; \$100.00 on barn No. 2, with shed attached; \$200.00 on hay contained in barns; \$200.00 on farming utensils."

The policy, which is made a part of the record in the case, while payable to the said Hugh C. Moore in the event of loss or damage to said property, contained a provision that "if the interest of the assured be other than unconditional and sole ownership" it should be null and void.

The evidence further tends to show that the said Hugh C. Moore made a written application to the company for said policy, and in the application, which is also made a part of the record, in answer to questions asked him in said written application, represented that he had a warranty deed to the land upon which the insured buildings were situated, and had owned the same for twenty years.

The undisputed proof is that none of the property covered by the policy belonged to the plaintiff in error, but the title to said property was vested in his wife as a general estate; and that plaintiff in error was simply controlling the same in the capacity of a trustee for his wife. It is further shown that the insurance company, at the time the policy was issued, had no knowledge of the fact that the title and ownership of the property covered by said policy was in the plaintiff in error's wife, and relied on the statements made by the plaintiff in error in the application.

Upon the failure of the plaintiff in error to pay the note sued on upon its maturity, the insurance company brought suit thereon before a Justice of the Peace as above stated. The case was finally carried to the Circuit Court of the county, where it was tried before the Circuit Judge and a jury. In the Circuit Court the warrant was amended

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so as to make the plaintiff in error's wife a party defendant, and upon a trial before the Court and a jury a verdict was rendered in favor of the insurance company against both of said defendants for the amount of said note and interest.

Defendants made a motion for a new trial, which was overruled as to the defendant, Hugh C. Moore, but was granted as to his wife, K. J. Moore. Judgment having been entered in accordance with the verdict of the jury against the defendant, Hugh C. Moore, he has appealed to this Court, and has assigned errors upon the judgment.

The principal error urged is, that there is no evidence to support the verdict and judgment, because the undisputed evidence shows that the policy was issued by the insurance company to Hugh C. Moore, and made payable to Hugh C. Moore in the event of loss or damage, when, in fact, the property was owned by his wife, K. J. Moore, and that, therefore, under the provisions of the policy to the effect, that if the assured be not the sole and unconditional owner of the property, the policy should be void, no risk ever attached; no premium was ever earned, and none could be collected on said policy. In other words, it is insisted by the plaintiff in error that the policy was void on account of him not being the absolute and unconditional owner of the property; that no liability or risk was incurred by the insurance company, and that, therefore, the note sued on was without consideration.

The undisputed evidence is that plaintiff in error knew that he was not the owner of the property at the time he took out the policy of insurance. He admits that he knew the policy was made payable to him, and admits that he never advised the insurance company of the true facts with respect to the title of the property, nor did he ever ask said company to amend the policy so as to make it payable

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to his wife, the true owner of the property, or to make the same payable to him as trustee. He admits that he intended to collect the policy if a loss occurred. The policy was issued in December, 1909, and had been in force something over three years when the present suit was brought to collect the balance of the unpaid premium represented by the note sued on in this action.

We are of opinion that the question of the ownership of the property at the time the policy was issued was a matter material to the risk, and the insurance company could have, if a loss had occurred, avoided payment under the policy, in view of the plaintiff in error's misrepresentations appearing in his application and the clause of the policy providing that if his interest in the property be other than unconditional and absolute, the policy should be void. *Catron v. Insurance Company*, 6 Hum., 176; *Aetna Insurance Company v. Miers*, 5 Sneed, 138.

In *Jones & Abbott v. Insurance Company*, 90 Tenn., 604, it was held that the contract of insurance is a conditional one. If no risk attaches, no premium, in the absence of fraud, is earned. And that where the risk never attached, and no risk was ever run, the premium is to be returned, in case it has been paid, and the assured was guilty of no fraud. The case is relied on by the plaintiff in error as controlling of the case at bar.

We are of opinion that there was evidence in the case under consideration tending to establish fraud on the part of the plaintiff in error with respect to the policy in question. At least, the facts are such as, we think, estop him from denying liability for the remainder of the premium due for said policy. There is evidence tending to show that he knew he was not the absolute and unconditional owner of the property at the time he made his application, and at the time the policy was issued and delivered

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to him. He knew the policy was issued in his name and not in the name of his wife, the true owner. He kept the policy until suit was brought by the company on the premium note, and says he would have attempted to collect the policy if a loss had occurred.

We think it would be inequitable and unjust for the plaintiff in error to be permitted to repudiate his liability for said premium, in view of these facts. The insurance company was in no way at fault in the matter. We must say that we are not favorably impressed with the good faith of the plaintiff in error in said transaction.

Certain errors are assigned upon the charge of the Court.

Without elaborating upon these assignments, it suffices to say that we are of opinion that the errors committed by the trial Judge in the instructions complained of, conceding that they were errors, were harmless and did not prejudice the plaintiff in error. We think the plaintiff in error is clearly estopped from denying liability on the note sued on.

It results that the judgment will be affirmed with costs.

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BETTIE HUME HAIRE V. JOE J. SMITH ET AL.

Writ of certiorari denied by the Supreme Court, 1914.

1. ASSIGNMENTS OF ERROR BY REFERENCE TO RECORD.

An assignment predicated upon the introduction of evidence is insufficient where it merely refers to the number and page of the transcript, and does not quote the words or embrace the full substance of the admitted testimony.

2. WILL CONTEST. *Declarations of testator before execution.*

It is competent in a will contest to prove the declarations of the testator as to his wishes, preferences and intentions, made before the execution of the will in issue.

3. SAME. *Subsequent declarations. Undue influence.*

Both prior and subsequent declarations of the testator are admissible to show mental condition and extent of undue influence in all cases where mental condition is involved and where there is other and independent evidence tending to show undue influence.

4. SAME. *Other wills.*

It is competent to prove the execution and the circumstances of executing other wills than the one in issue, for the purpose of showing testator's desires and intentions.

5. SAME. *Existence of coercion.*

It is competent to prove the declaration of a testator made before the execution of the will in issue that a prior will was executed by him under duress.

6. SAME. *Instructions of court calling the attention of the jury to circumstances stating theory.*

It is not reversible error for the Circuit Judge in his instructions to state the respective theories of the parties to a will contest and to call the attention of the jury to circumstances which have a bearing on the question of undue influence. Nor is it

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error for the Court to state that if they believed certain evidence to be true, they should treat the will as invalid, if as a fact the instrument would not under the circumstances be the will of the testator.

FROM MONROE COUNTY.

Appeal in error from the Circuit Court of Monroe County. SAM C. BROWN, Judge.

MCCROSKEY & PEACE, R. H. SANSOM and JOHN W. HUDSON for Plaintiff in Error.

JEROME TEMPLETON, SAM EPPS YOUNG and D. T. YOUNG for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is a will contest. The will involved is the one purporting to have been executed by Col. John T. M. Haire of Monroe County, on June 21, 1912. He died on the 6th of July following, at the advanced age of 84. In the will under fire his widow was named as executrix and sole beneficiary. Some of the heirs at law of the testator instituted this contest. The will was assailed upon the ground that the testator was lacking in mental capacity and that it was procured by undue influence. Issues were made up and submitted to Judge Brown and a jury at Madisonville. The verdict of the jury was against the validity of the instrument. The executrix sought a new trial. Her motion was disallowed and judgment was pronounced upon the verdict. An appeal was prayed and perfected by Mrs. Haire and she is here assigning numer-

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ous errors. Learned counsel representing her have presented the issues with great force and clearness and caused us to examine the record with extreme care, as of course we should in all cases. We shall refer to all the assignments of error, but not separately nor in the order in which they are made. We think it most appropriate that we discuss assignment No. 4 at the outset.

This fourth assignment purports to be predicated upon the action of the trial Judge in admitting certain testimony referred to in the assignment as being at different pages in the transcript, to which pages reference is made. There is nothing on the face of the assignment to show what the objectionable evidence was. In order to pass upon this assignment it is absolutely necessary that the member of the Court having the record turn to the cited portion of the transcript and read it for himself. We feel constrained to hold that this assignment is not well made and that it is insufficient to call forth the labors of this Court in ascertaining whether or not error was committed. An assignment predicated upon the admission or rejection of evidence must contain the full substance of the evidence, or so much of it as to enable the Court to determine the materiality and propriety of the evidence without referring to the transcript: *Nance v. Smith*, 10 Cates, 349. This is a specific requirement of the bar rules of the Supreme Court recently announced and adopted with one or two exceptions by this Court.

Notwithstanding the insufficiency of this assignment we have read this entire transcript, and of course the class of evidence above criticized came under our view. Not desiring to repel anyone often on technical grounds, we passed over the insufficiency of the assignment and examined the questions arising. We are constrained to the view that no reversible error was committed by the learned

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trial Judge in admitting the evidence objected to, and our reasons for arriving at this conclusion shall be briefly stated.

The testimony objected to was to the effect that the testator had made repeated declaration as to the way in which he desired his property to go and also of his dissatisfaction with the efforts and importunities of people to make a will in their favor, and also his dissatisfaction with former wills. There was also evidence of his declarations that he was under coercion, and that he had been or would be forced to make a will contrary to his wishes. All this evidence was with respect to declarations made before the execution of the will in controversy; and this fact relieves the situation of a great deal of embarrassment occasioned by contrariety of judicial opinion. The rule is almost universal that the declarations of a testator antedating his will as to how his property shall be disposed of, or of his likes and dislikes, and of his mental attitude with respect property or persons, are admissible when the validity of his *subsequently* made will is in issue. For juristic purposes it is assumed that his declarations thus made were without bad motive, and that they were sincere; and, further, that they reveal the state of his mind at the time, and are helpful as reflecting upon the state of his mind at the time of the making of the will in controversy. In other words, in passing upon the question as to whether a contested will represents the wishes of the testator, it is always competent to find out his mental attitude, his wishes and his affections *expressed* by him before the execution of the will in controversy. Hence, the soundness of the rule admitting such evidence.

The learned trial Judge was careful to confine this testimony to the issue of the state of the old man's mind, for the purpose of revealing his weakness and susceptibility

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to undue influence as well as with reference to the question of his having been induced or coerced by another to abandon his original intentions. As a matter of fact, the Court was with respect to some of the evidence too strict in his rulings as to the applicability of the evidence thus adduced. Contestants, as hereinbefore stated, had the right to show the feelings and wishes of Col. Haire toward his wife or his wife's people and toward his own, and they could well have insisted that declarations revealing this disposition and state of mind be unqualifiedly admitted. Such declarations are not hearsay. See 4 Chamberlayne, sections 2675-76-77; also *Hobson v. Moorman*, 115 Tenn., 73. It is well to bear in mind the fact hereinabove referred to that these declarations were antecedent to the will involved. Learned counsel refer us to the very celebrated and admirably written opinion in *Throckmorton v. Holt*, 180 U. S., 552, cited approvingly by our Supreme Court in the case of *Earp v. Eddington*, 107 Tenn., 23, as controlling authority for the exclusion of such evidence. The cases referred to involved subsequent declarations and hence is not strictly in point. But in Tennessee, and in general elsewhere, even the subsequent declarations of a testator are admitted for the purpose of showing the state of his mind at the time of the making of the will. This evidence of course cannot be relied upon to establish the *fact* of undue influence; and great caution must be observed in its admission. But when there is any extraneous evidence of undue influence, such as the revelation of a purpose by the beneficiary to dominate the testator, or of efforts to procure a certain will, these declarations are admissible: *Peery v. Peery*, 94 Tenn., 331; *Hobson v. Moorman*, *supra*. We find in this case some evidence other than that of the declarations of the testator to the effect that he was subjected to influences at variance

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with his wishes. Evidence of declarations was, therefore, admissible, especially in view of the issue of mental incapacity or weakness which was also involved. That this class of evidence is competent is well established and the reason of its admission justifiable needs no other support than the admirable opinion of Judge McAlister in *Hobson v. Moorman*, *supra*.

While some of the declarations admitted certainly had reference to matters of fact aside from Col. Haire's mental state, they were nevertheless competent as revealing the state of his mind and extent of influence and his susceptibility to influence, and also *extent* of influence. It is not likely that a man will make false statements at such juncture concerning his mental state. Hence, the validity of such testimony.

The fifth assignment should be next disposed of. It is based upon the action of the Court in admitting a will executed in 1909 by the testator, and a will made by him in 1911, about six months before the execution of the will in controversy, together with the circumstances of the execution of these two papers. There was no error in this. They were competent and were certainly relevant to the issues involved: *Demonbreum v. Walker*, 4 Baxter, 399. This assignment of error is overruled.

We shall now recur to the first, second and third assignment of error. The fourth and fifth were passed upon by us before entering upon a discussion of the question raised by the three above named assignments respecting the sufficiency of the evidence to justify the Court in submitting the issues to the jury and his refusal to set the verdict aside. The predicate of the first and second assignments was the refusal of the Court to direct a verdict. The third one is that there was no evidence to support the verdict. In passing upon these questions all the evidence criticized in

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assignments Nos. 4 and 5 will be considered as having been properly before the jury.

The evidence tending to support the issue of mental incapacity is not by any means sufficient to sustain the verdict. Nevertheless, the evidence bearing upon this point was competent, and it is material, in that it discloses the fact that the testator was of very great age and very much weakened physically, and that he was suffering from diseases or complaints which affected his mind.

With respect to the issue of undue influence we have been constrained to the conclusion that the record discloses material evidence upon which the verdict of the jury adverse to the will can find support. The insistence of contestants was that the widow of Col. Haire, a childless woman, was well provided for and had married Col. Haire late in life, and did not need his bounty other than a life estate, while on the other hand numerous nephews and nieces of the testator were in need and that Col. Haire was solicitous about them; that Mrs. Haire alone, or in conjunction with her brother-in-law, Rogers, and possibly others, had determined to coerce her husband into giving her the whole of his estate, and that pursuant to this scheme they guarded him and watched him closely and dominated and hectored him to such an extent as to deprive him of his free agency; and that these influences were concentrated upon the testator during the last few weeks of his life and resulted in the execution of a will which did not represent his wishes. There is material evidence from which the triers of fact could have reached this conclusion. The contention, upon the other hand, was that the desire of the testator was that his wife have his property, and that the instrument in question expressed his own wishes, and that it was executed by him without influence or coercion. It is also urged that the wife exerted no undue

influence, and that if she did discuss with her husband the making of a will, she had the right to do so, provided she did not go to the extent of depriving him of his free agency. These contentions were submitted to the jury upon evidence calling for appropriate instructions. The finding of the jury must therefore with respect to the conclusions of fact be accepted as binding upon us. We shall not enumerate the evidence sustaining the verdict beyond that which has hereinabove been set out other than a reference to a declaration made by the testator in the will of 1911. The execution of this instrument was clearly shown. In fact, it is wholly in the handwriting of the testator and was sent by him to a depository for safe-keeping until his death. In this document he refers to the execution of the will of 1909 and solemnly asserted that the 1909 document had been executed by him under protest. Following this, is evidence of declarations made by the testator a short while before the making of the will in question to the effect that the parties about him were drafting some sort of an instrument and were going to require him to sign it. The competency of this latter evidence is beyond controversy, and its materiality is so plain as to be unassailable: *Bennet v. Smith*, 21 Barbour, 439; 4 Chamberlayne, 2677. Assignments of errors Nos. 1, 2 and 3 are overruled.

In the eighth assignment of error certain portions of the charge of the trial Judge are criticized. We shall not copy these instructions verbatim, but shall present in condensed forms the propositions embraced by them. In the first section assailed the trial Judge told the jury that it was proper for them to look to the physical condition and appearance and conduct and conversation of Col. Haire before and after the execution of the will for the purpose of determining the state of his mind. There was no error in this.

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In excerpts C and D of the portion of the charge assailed, the Court in substance instructed the jury that it was competent for them to consider the declarations of the testator at and before and after the making of the will of June 21, 1912, with respect to his likes and dislikes and of his intentions and with reference to previous wills, all for the purpose of passing upon his mental condition at the time the will was executed, and to determine whether it was his voluntary act and free from undue influence. We see no error in this. The law is that jurors may undoubtedly look to all these matters in passing upon the question, and we do not understand it to be error for the trial Judge to bring to the attention of the jury the relevant evidence and to state to them the use which they are to make of it in arriving at their verdict. This is commendable in a heated and prolonged will contest. Similar instructions were approved in the case of *Hobson v. Moorman*, *supra*, or at least not condemned. In subsection E of the charge, it is said that the Court stated to the jury that if they found that the testator was old and sick and had been feeble for a long time and that if for any reason had become afraid of those around him and that if this fear had put him in such a state of mind that he was afraid to do things that were requested of him by his wife or any other person around him, and that while in this condition the paper in controversy was presented to him, he signed the same because of this state of fear and condition of mind, contrary to his desires or his intention so to dispose of his property, the will in question would not be his and that the verdict should be for the defendants. This excerpt standing alone might be criticized because it fails to go to the length required to destroy a will because of extraneous influences. It would have been well if the Court had stated to the jury that in order to avoid the

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instrument because of undue influence the fear and intimidation must have been of such strength as to overcome his free agency. But when this instruction is read in connection with other parts of his charge to the effect that the instrument could not be set aside because of undue influence unless this extraneous influence was insufficient to overcome his free agency and to produce the will of another, instead of the testator, we do not believe that reversible error is brought to our attention. We here again remark that learned counsel failed to assign any reason why this instruction was erroneous and wherein it was prejudicial.

In subsection F it is insisted that the Court committed error in stating to the jury that if a short while before the execution of the will in controversy the testator wrote out a will in his own handwriting and lodged it in the hands of another for safe-keeping, and that this will was different from the provisions of the will in controversy, the jury might look to this as a circumstance going to show the mental capacity of Col. Haire or his susceptibility to undue influence. This is a matter which could have been omitted by the trial Judge, but we do not believe that prejudicial error was committed. This was a fact to which the jury could advert in their deliberations upon the question as to whether or not in his last days a will had been substituted to take the place of the former one contrary to the intentions and wishes of the testator.

After examining the whole charge and bearing in mind the oft-repeated statements of the trial Judge throughout the development of the case that these matters were submitted to the jury for the purpose of reflecting upon the testator's state of mind and not as independent evidence of undue influence, we are persuaded that no material and reversible error was committed.

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Notwithstanding many things and much evidence contrary to this verdict, and notwithstanding many and substantial reasons for disbelieving a great deal of the evidence upon which the verdict was based, we feel constrained to affirm the judgment of the lower Court. The credibility of the witnesses was a question for the jury and ultimately for the trial Judge. The judgment of the lower Court is affirmed with costs.

S. O. DRAKE v. PHOENIX COTTON OIL COMPANY.

Writ of certiorari denied by the Supreme Court at
Jackson, 1915.

1. LANDLORD'S LIEN. *Liability of purchaser of crop from tenant.*

In order to hold the purchaser of a crop from a tenant liable to the landlord for its value in an action of debt, it is incumbent upon the landlord to show that the purchase was made within three months after the rent became due.

2. SAME. *Liability of purchaser.*

Anyone who purchases the crop of a tenant who has not discharged the rent debt due the landlord is personally liable for the value of the crop if he purchased while the lien was in existence, and this liability may be enforced at any time within six years. But there is no liability to the landlord for purchases made after the expiration of the time in which the lien is to be enforced.

FROM DYER COUNTY.

Appeal in error from the Circuit Court of Dyer County.
JOSEPH E. JONES, Judge.

Drake v. Cotton Oil Co.

DRAPER & RICE for Plaintiff in Error.

T. C. GORDON for Defendants in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS suit was commenced by Mr. Drake against the Phoenix Cotton & Oil Co., February 22, 1913, to recover an alleged balance of rent due him from one Ed Butler.

The Justice of the Peace decided the case against Mr. Drake, and he appealed to the Circuit Court. It was tried in the Circuit Court before the Court and a jury at its February term, 1914, upon an agreed state of facts. The agreed state of facts is as follows:

"The plaintiff, Drake, owns a farm in Dyer County, and in 1911 he rented a part of said farm to Ed Butler, who, among other crops, raised some cotton. He executed his rent note to said Drake for one hundred dollars as the rental for said land for 1911, and his said note was due November 15, 1911.

July 9, 1912, the tenant, Ed Butler, sold to the Phoenix Cotton & Oil Co., twelve hundred pounds of cotton raised by Butler on said farm in 1911, and on July 9, 1912, when the Phoenix Cotton & Oil Co. bought the cotton Mr. Drake claimed a balance of \$32.25 still due from Butler on the rent note of one hundred dollars for rent of the farm for 1911.

The contention of Drake was that he did not know that Butler was selling the cotton, and had not agreed nor authorized him to sell it, but Butler claims that he did.

The value of the twelve hundred pounds of cotton bought by the defendant Phoenix Cotton & Oil Co. was \$24.00. The defendant, Oil Co., claimed that Butler had paid all his rent when the cotton was bought by it, and this was a disputed question of fact in the case."

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At the conclusion of the evidence the trial Judge directed the jury to return a verdict for the defendant in error, which was done.

To this action of the Court in directing the verdict the plaintiff below excepted. He moved for a new trial upon two grounds:

1. The Court erred in holding that the plaintiff in the case could not recover of the defendant, upon the ground that the cotton bought by it from plaintiff's tenant was not purchased by it until after the plaintiff's landlord's lien for rent had expired.

2. The Court erred in giving directions to the jury in favor of defendant in error and against plaintiff upon the ground that the cotton was not bought by it from plaintiff's tenant until after plaintiff's landlord's lien for rent had expired.

This motion was overruled, to which exception was taken and the case was appealed to this Court by plaintiff in error.

The assignment of error in this Court is, that the Court erred in directing a verdict in favor of the Phoenix Cotton & Oil Co., and in dismissing the suit and taxing plaintiff below with the costs.

It is, therefore, seen that the question in the case is—

“Can a landlord, renting land, and, having under the statute, a lien on the crops raised on the rented land to secure his rent, stand by, without taking any steps to enforce his lien until his right to enforce it has expired, collect his rent from a purchaser of the crop raised on the land, who purchased after the expiration of the lien, in ignorance of the fact that the tenant had not paid the rent?”

In this case the rent was due plaintiff in error November 15, 1911. This tenant sold the 1,200 pounds of cotton involved to defendant in error July 9, 1912. The able and learned counsel of Mr. Drake admits that his landlord's lien for rent had expired when the cotton was sold, and, hence, Drake could not follow the cotton by attachment, or any other legal process, nor could he have reached the cotton in the hand of his tenant, Butler, by any legal proceeding to enforce a lien, as, at that time, he had no lien.

His contention is, that the landlord's remedy against the purchaser of a crop, or any part of a crop, raised on his farm, from his tenant is an independent remedy entirely disconnected from, and in no way dependent on, the landlord's lien for his rent, or any part of it, unpaid.

His argument, as we understood it, is, that the landlord's claim against the purchaser of a crop, or part of a crop, from his tenant was in the nature, by virtue of the terms of our statute, of a debt, and was recoverable from the purchaser at any time within six years from the time his right of action accrued, which was at the time the crop was purchased.

Under the Act of 1825, chapter 21, Shannon's Revisal, section 5299, it is provided that:

"Any debt by note, account, or otherwise, created for the rent of land, is a lien on the crop growing or made on the premises, in preference to all other debts from the date of the contract."

Under the Act of 1857-8, Shan. Rev. 5300, the lien provided for in the preceding section continues for three months after the rent debt becomes due, and until the termination of any suit commenced within that time to collect the rent. Section 5301 provides that the landlord's

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lien may be enforced by original attachment issued on affidavit that the rent is due and unpaid; or, before due, upon affidavit that the defendant is about to remove or sell the crop; or, by judgment at law against the tenant and execution to be levied on the crops in whosoever hands it may be. Counsel of Mr. Drake relies upon the Act of 1879, Shan., section 5306, which is as follows:

“And the person entitled to the rent may recover from the purchaser of the crop, or any part of it, the value of the property, so that it does not exceed the amount of the rent and damages.”

And its construction by our Supreme Court in the cases of *Davis v. Wilson*, 2 Pick., 519, and *Biggs and Moore v. Piper and Son*, 2 Pick., 589.

Under the Act of 1905, chapter 32, the duration of the landlord's lien for rent was extended from three to six months from the date the rent was due. It is conceded that the tenant in this case did not sell the cotton to the defendant in error until some eight months after the rent was due.

The construction of the Act of 1825 was repeatedly before our Supreme Court before the adoption of the Code of 1858, and Chief Justice Nicholson, in the case of *John Phillip v. George Maxwell* stated in the propositions settled by the decisions, as follows:

1. “That the landlord had only a right of priority of payment over other creditors, and not a specific lien.”
2. “That he never could follow the crop or its proceeds into the hands of a third party, without first getting judgment and execution against the tenant.”
3. “That the only mode of converting the landlord's inchoat lien, or right of priority of payment, into a fixed

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or specific lien was by obtaining judgment and execution upon the debt due for the rent against the tenant."

4. "That when judgment and execution were obtained against the tenant, the lien became fixed and operative from the time at which the debt was due.

The Chief Justice cites six cases supporting the above propositions.

In the case of *Richardson and Nelson v. Blakemore*, 11 Lea, 290-294, Chief Justice Deaderick, speaking for the Court, it was held that under the Act of 1825 a debt for rent of land was a lien on the crop in preference to all other debts, and that the lien could be enforced by attachment, or judgment against the tenant and execution levied on the crop in whosoever hands it might be." Under the Act of 1825 the landlord could not sue the purchaser of the crop until he had obtained judgment against the tenant. But by the Act of 1857-8 the landlord, or the person entitled to the rent could recover from the purchaser of the crop, or any part of it, *with notice of the lien*. This legislation was amended by the Act of 1879, chapter 72, Shan., section 5302, above copied, so as to make the purchaser of a crop, or any part of it, liable, not exceeding the amount of the rent and damages, although he may not have had notice of the lien. 11 Lea, *supra*.

We now come to the two cases, mainly and specifically relied on by counsel of appellant—*Davis v. Wilson* and *Biggs and Moore v. Piper and Son*, 2 Pickle.

We concede that the general language, or a part of it, used by the learned Judges preparing the opinions in the cases seem to sustain the contention of able counsel of appellant.

It is true, also, that Mr. Shannon, in note 7, under section 5302, referring to the case of *Davis v. Wilson*, 2

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Pickle, 521-22, states that the right of action of the landlord against the purchaser of a crop, or part of it did not expire with the lien for rents, but subsisted for six months after the date of the purchase, for that was when the right of action accrued.

In that case a Mrs. Wilson rented land to two parties for 1886 for \$860.00, payable August 1 of that year. In June of that year one Davis purchased from the tenants of Mrs. Wilson a crop of wheat grown upon the land. November 9, 1886, Mrs. Wilson sued the purchaser before a Justice of the Peace. The case was appealed to the Circuit Court by Davis. The crop purchased was worth more than the rent. The contention of Davis was that he bought the crop without notice of any lien, and that the action was barred by the statute of three months, or under the then existing law, the landlord's lien existed for only three months from the maturity of rent debt, and in her case, her suit was brought more than three months after her rent became due. Under these facts Mr. Justice Caldwell, speaking for the Court, said:

"This position (referring to the second contention of Davis) would certainly be sound if this suit had been brought with a view of enforcing the landlord's lien on the crop; for, by the express terms of the statute, the lien continues for only three months after the rent became due and until the termination of any suit commenced within that period for the collection of the rent.. The application of this statute is the same whether the proceeding be against the crops in the hands of the tenant, or in the hands of a purchaser." *Phillips v. Maxwell*, 1 Bax., 31.

"But such is not the purpose of this action. No effort is made to enforce the lien, or in any other manner impound or subject the crop itself. It is an action of debt against the purchaser of the crop under the Act of 1879."

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The learned Justice then copies the Act as carried into Shannon's Revisal, section 5302, hereinbefore set out, and proceeds:

"This statute gives the landlord a right of action which is not limited by the duration of the lien against the crop—a right of action against the purchaser personally, and without reference to the existence or non-existence of the lien, when suit may be brought against him.

This purchase of the crop, *while subject to the lien*, is an interference with the rights of the landlord, and for that interference he may be sued by the landlord before the rent is due."

Citing, *Richardson and Nelson v. Blakemore*, 11 Lea, 290: "The statute giving the right of action makes no provision, in terms, with respect to the time in which the suit shall be brought, but it indicates the nature of the suit, by saying that it shall be 'for the value of the property.' This contemplates an action of debt, as upon an implied contract, or promise, on the part of the purchaser, and falls with the last clause of section 3472 (M. & V.), Shannon, section 3472, which requires that actions or contracts, not otherwise expressly provided for shall be commenced within six years after the cause of action accrued."

As we stated, confine this opinion to the facts of the case, and go down to the rock bottom idea leading to the conclusion announced in it we might concede the correctness of its exposition of the statute in question, although, as said by Judges Lurton and Fowlkes, it exposed the merchant or purchasing class of the community to a harsh measure of liability.

The essential basis of liability of the purchaser in the case, if it has any logical or just basis under the statute,

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by the fair intendment of the language of the opinion, landlord to pay the rent due him if the tenant fails to pay it. To give the opinion the large range contended for by able counsel would seriously and radically interfere with manifold commercial transactions, involving in this country multiplied thousands of dollars. In this republic of ours, there are thousands upon thousands of tenant farmers, and the number is increasing. In many instances, we believe, we may say, in the large majority of instances, friendly and trusting relations continue from year to year between landlords and their tenants, and their rental contracts continue, although all their rent for particular years may not be paid when due, as the tenant may hold all his surplus wheat, cotton or corn, or a part of it, for a year or more for a better market.

In some cases, perhaps in many, the tenant may hold his surplus crop for a year or more, and then sell to a purchaser, his landlord standing by, taking no steps to enforce his lien, or to collect his rent, or the balance of rent is, that the purchaser purchasing the crop during the existence of the landlord's lien, impliedly contracts with the due him.

Can it be said that the purchaser of the crop of a tenant, or a part of it, raised one, two, three, four, or five years before it was purchased, will, under the statute, be held liable for the balance of the rent due the landlord for the year the purchased crop was raised? We are unable to believe that the Legislature, in enacting the statute, intended any such anomaly, and we feel inclined to say, any such radical interference with the customary business dealings of sellers and purchasers of farming products.

The case of *Biggs & Moore v. Piper and Son*, 2 Pickle, 589, under its facts, does not sustain the insistence of able counsel of appellant.

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The principle decided in the case is, that an assignee of a rent note can hold the purchaser of a crop from the tenant, which crop is subject to a lien for the rent, for any amount due on the note which does not exceed the value of the crop purchased.

Judge Fowlkes, speaking for the Court, said this was controlled by the statute, which provided that "the person entitled to the rent may recover from the purchaser."

But Judge Fowlkes, also said, referring to the case of *Davis v. Wilson*, that the Court had held at that term of the Court, under the statute, that the landlord might sue the purchaser of the crop for the value of the property after the expiration of three months from the maturity of the debt for the rent, where the sale was made *within the three months*, now within six months; and, says the learned Justice, "from which it is clear, that the right of action against the purchaser is not dependent upon the lien, but it is an independent and substantive cause of action given by statute against the purchaser of crops from a tenant who has not paid his rent.

It is an independent and substantive cause of action against the purchaser, because, in purchasing from the tenant during the existence of the lien of the landlord, he contracted, as a matter of law, to pay the rent which the tenant failed to pay to the extent of the value of the crop he purchased.

If correct in the views herein stated, it follows, that there is no error in the action and the judgment of the lower Court, and the same are affirmed with costs.

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WALTON-McDOWELL COMPANY v. ROBERT JACKSON.

Writ of certiorari denied by the Supreme Court,
December, 1914.

1. INJURIES TO REALTY. *Measure of damages.*

If injuries to realty are of a permanent nature, the difference in market value just before and just after, is the measure of damages. If temporary damages be inflicted, the rental value is generally the rule.

2. SAME. *Cost of repairing.*

But when the injuries consist of damage to buildings or other improvements it is always proper to allow as an element of damages the cost of restoring the buildings or improvements to their former condition. In such case the measure applicable to permanent damages should not be so applied as to exclude recovery of cost of repairs.

FROM DAVIDSON COUNTY.

Appeal in error from the Circuit Court of Davidson County. M. H. MEEKS, Judge.

P. M. ESTES for Plaintiff in Error.

M. T. BRYAN for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS suit was commenced by defendant in error against the Walton-McDowell Co., a corporation, and the Lewisburg & Northern Railroad Company, a corporation, before a Justice of the Peace, to recover damages on account of

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injury to his real estate situated in the plan of Grand View Heights, the injury being occasioned by blasting.

The Justice of the Peace rendered judgment against the Walton-McDowell Company for \$359.70 and the costs of the suit. He dismissed the suit as to the Lewisburg & Northern Railroad Company.

The plaintiff in error, the Walton-McDowell Company, prayed and was granted an appeal to the Circuit Court. The case was heard in the Circuit Court before the Judge without a jury, February 8, 1914. He found the matters in controversy in favor of defendant in error and assessed his damages for injuries inflicted on the houses mentioned prior to December 13, 1913, on Caldwell Street, Cline Street and Cherry Street, belonging to defendant in error at the sum of \$309.07, and rendered judgment for said sum and the cost.

Walton-McDowell Company moved for a new trial, stating eight grounds in support thereof.

Their motion was overruled, to which they excepted, and prayed and were granted an appeal in error to this Court.

They assign the following errors:

1. The Court erred in allowing as a measure of recovery the amount required to repair damages suffered, the correct measure of damages in the case of injury to real property being in the case of temporary damages, the loss of the rental or usable value of the property, and in the case of permanent damages the difference in the market value immediately before and immediately after the injury was received.

2. The Court erred in allowing the plaintiff to recover the sum of \$309.70.

Mr. Jackson owned seven or eight frame houses comparatively new, the oldest being erected some six years

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ago, the others about two years ago, all located from fifty to three hundred yards from the line of the Lewisburg & Northern Railroad, not far from the corporate limits of Nashville.

The damages sued for is for injury to his houses caused by blasting the rock from a cut from twenty-five to thirty-six feet deep in the line of said railroad. This blasting commenced in May, 1913, and continued until after the bringing of this suit, in December, 1913.

The blasting was done by plaintiffs in error, or a subcontractor under them. That the blasting was heavy the evidence strongly tends to show. The evidence tends to show that it loosened the houses, or some of them, on their foundations. It threw rock on them, one rock of considerable size falling upon and going through the roof of one of them. The proof tends to show that it shook pictures from the walls of the houses, broke the plastering and papering on the walls, twisted the doors and window frames, and the evidence is, that it interefered with the pipes in the wells from which his tenants used water, so that they had to be taken out and repaired.

Mr. Jackson produced an itemized account showing that he had paid out \$209.07 in repairing damages caused by the blasting. There is no material evidence in the record that the repairs were not made necessary by the blasting, or that excessive or unreasonable prices were paid therefor.

All the evidence tends to show that the houses were in good condition when the blasting commenced and all were occupied.

It appears from the evidence that Mr. Jackson was particular in looking after the houses and seeing that they kept in good condition. Two items entering into the

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\$209.07 are assailed, one of \$68.40 and the other of \$24.00.

It appears that some of the houses on Cline Street had not been papered, but the plastering had been shattered and Mr. Jackson, instead of patching the broken places in the plastering, or putting on new plastering, put on papering to hold the plaster in place and to cover the other spaces.

Mr. Jackson testified in regard to this as follows:

Q. "State to the Court which was cheaper, to put the paper on to hold the plastering, or to take off the plastering and put on new or patch it up?"

A. "Paper was a good deal cheaper and so much cleaner for the people. I did not want to run the people out of the houses; did it to save my tenants."

Taking this evidence to be true, and there is none of material import to the contrary in the record, it is apparent, we think, that plaintiffs error have no meritorious ground of complaint as to this item.

The same observations apply to the objection to the item of \$24.38.

The first assignment of error, it appears, proceeds on the proposition that if the damages sued for in this case were temporary damages, the measure of recovery was the decrease in the rental, or usable value of the property caused by the injury, and if the injuries were permanent, the property being real estate, the measure of recovery was the difference in the market value of the property before and after the injury to the property.

This suit was for temporary injury to the houses of Mr. Jackson cause by the blasting, up to the bringing of the suit. The Judge trying the case was not requested to reduce his findings of fact to writing, and it does not ap-

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pear, in the terms of the judgment rendered the measure of damages that the learned trial Judge applied.

From the evidence in the case and the amount of the judgment, it is obvious, we think, that the Court endeavored to allow Mr. Jackson what it had already cost, and what more it would cost him, to put his property in the condition it was before it was injured by the blasting of plaintiffs in error, or their sub-contractor.

This was the correct measure of recovery to apply in this case under the evidence, it being a suit for temporary damages to the property.

This measure of recovery is, in principle, sustained by the following cases: *Telephone Co. v. Railroad*, 93 Tenn., 492; *Terminal Co. v. Jacobs*, 109 Tenn., 727-41; *Swain v. Copper Co.*, 111 Tenn., 437; *Madison v. Copper Co.*, 113 Tenn., 331; *Terminal Co. v. Lellyett*, 114 Tenn., 368; *Gossett v. Railroad*, 115 Tenn., 376; *Telephone & Telegraph Co. v. Stoneking*, 1 Higg., 241.

If injury was inflicted upon the property of Mr. Jackson by the blasting, as alleged in this case, it is immaterial whether it was done negligently, or with the utmost care and caution, and whether done by the Lewisburg & Northern Railroad, or by its contractor, or sub-contractor of the contractor, as each and all of them were liable, and any one or all could have been sued.

This case having been tried by the Judge without a jury, if there be material evidence to support his finding as to the amount of damages and the items making upon the amount, his judgment will not be disturbed in this Court. There is evidence to sustain his finding of the amount of damages.

His judgment will be affirmed with costs.

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G. B. MEARS ET AL. V. SAM WHARTON, EXECUTOR.

(Writ of certiorari denied by the Supreme Court,
at Nashville, 1914.)

1. *WILLS. Construction. Equality.*

When an equal distribution of the testator's estate is indicated, it is the duty of the Court to so construe the will as to bring about as nearly as possible absolute equality of participation among his legatees and devisees.

2. *SAME. Predominant intention.*

When one controlling or predominant purpose of a testator is expressed, it is the duty of the Court to so construe his will as to effectuate this major intention, and to construe all subsidiary clauses so as to bring them into subordination. Especially is this rule applicable when equality is the primary intention of the testator.

3. *SAME. Time to which language of the will should be referred.*

Whether the will of a testator shall with respect to values or as to specific property, be held to speak as of the day of the execution of the will or the day of the testator's death, will be determined by considering all the provisions of the will as a whole and paying due regard to the subject-matter.

4. *SAME.*

A testator devised one thousand dollars of bank stock to each of two parties and five hundred dollars of bank stock to another and used language which revealed the fact that the testator treated his bank stock as worth at the time one hundred and fifteen dollars per share. It was shown that at the time of testator's death the stock was worth two hundred dollars per share. In other sentences the testator bequeathed sums of money to these legatees and to others and referred to his bequest of bank stock as an equivalent in value. *Held*, That the will should be held to speak with reference to the time of its execution, and that it should be so construed as to work equality; and that in order to accomplish this end the

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legatees were to have the expressed equivalent in bank stock, valued at two hundred dollars per share instead of one hundred and fifteen.

5. SAME. *Legacies, general or specific.*

The language used by the testator did not make the bequests of bank stock specific legacies. Neither were they general legacies, but rather demonstrative in nature.

FROM CANNON COUNTY.

Appealed from the Chancery Court of Cannon County.
ALBERT H. ROBERTS, Chancellor.

E. D. HANCOCK, JOSH BARTON for Complainants.

WALTER HANCOCK and HOUSTON for Defendants.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS bill was filed to have construed the will of T. B. Mears, who died in Florida, in May, 1913, having been a resident of Cannon County, in this State. On the 25th of November, 1904, while living in Cannon County, Mr. Mears made and published his last will and testament in which he divided his property among his three brothers, a sister and the widow of one of his brothers. His property consisted altogether of personalty and was largely composed of shares of bank stock and shares of stock in other corporations, and was supposed to be worth about \$20,000 at the time of his death. At the date of the making of his will and at the time of his death, he was the owner of thirty-five shares of stock in the Bank of Woodbury, located in Cannon County of this State. The

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deceased was, for a long time, the cashier of this bank, and, at the date he made his will, then knew its book and its market value. For sometime before his death the deceased was in bad health and about two years before the execution of his will he had a stroke of paralysis, from which we infer he never recovered and which doubtless hastened his death and was probably the cause of it. His will was made and published in the State of Florida, when, as we suppose, he was on a visit to that State in the search of health.

In order to a better understanding of the bequests made by him, and the terms of his will, it is necessary to copy it in full in this opinion. After the usual forms found in wills, and directing his funeral expenses and debts to be paid, then follows the body of the will:

"I give and devise and bequeath unto my four brothers and sisters that live in this county, or to the head of the family during their natural life and then to their heirs. The first two of the within named, John C. Mears and Amanda M. Mullinax, wife of James P. Mullinax, \$1,000 of bank stock in the Bank of Woodbury, Cannon County, each to have and to hold and to use the proceeds of the same during their natural life, after which the \$1,000 stock each to go to their heirs and as to the third one, Elizabeth M. Mears, the widow of my brother, Elijah Mears, deceased, I give to her \$1,000 of bank stock in the Bank of Woodbury, Cannon County, to have and to hold and to use the proceeds of the same for her individual use, during her natural life and then to go to the heirs of her and Elijah Mears.

"Now as to the fourth one of the within named four, I give to my brother, G. B. Mears, \$5.00.00 in bank stock five (5) shares in the Bank of Woodbury, Cannon County,

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and \$575.00 in money, to be paid him by executor as soon as convenient out of the estate in order to make him up equal with the other foregoing named three; the bank stock to be held by and the proceeds to be used by him and for himself or as he sees fit to use them during his natural life and the five shares to go to his heirs and the money for himself or as he desires.

"I will and direct that my executor sell enough of property to pay off Frances Ann Miller, my youngest sister, the wife of Frank P. Miller, whose whereabouts is unknown to me, if found living and if not living to be paid to legal authorities for her heirs, the amount of \$1,150.00 to make her or her heirs up equal to the amount that I give to the first four heirs to the estate to be paid not sooner than the bank stock is transferred, no bank stock to be transferred until after the dividend is paid on December 31, 1907, or on January 1, '08. I recommend that after this named dividend is declared to the executor that he transfer the stock and sell other bank stock and pay off the heirs to the estate.

"3thly.

"I give to my executor whom I will hereinafter name all of my books, albums and pictures not disposed of.

"4th.

"As to all of rest residue and remainder of my property, both real and personal, bank stock, live stock, goods and chattels wheresoever and whatsoever belonging to me be sold by my executor and be divided equal between the five within named heirs to my estate share and share alike, after retaining reasonable compensation for service to be allowed by the Court."

He then appointed Sam W. Wharton as the executor of his will, which was probated on the 2d of June, 1913, in the County Court of Cannon County, Tennessee.

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In an agreed statement of facts, that seems to have been the only proof heard at the trial of the cause in the lower Court, it appears that the market value of the shares of stock in the Bank of Woodbury named in the will, was, on the 25th of November, 1904, the date when the will was executed, worth \$115.00 per share. It is further recited in the agreed statement of facts that, at the date of the death of the testator, to wit, May, 1913, the market value of these shares of stock in the Bank of Woodbury, was on that date, \$200.00 per share, and the book value \$119.00 per share; and the question submitted to us for our determination is whether, in the distribution of this estate to the different legatees, the shares of stock in the Bank of Woodbury and bequeathed to four of the legatees, should be valued at their market value at the date when the will was executed, or at their market value at the date when the testator died. Their value being, at the date of his death, \$200.00 per share, if the value at the date of the execution of the will is taken, it is insisted then that three of the legatees, to wit, John C. Mears, Mrs. Mullinax and Elizabeth Mears, will each receive \$2,000.00 under the will; that is, the legacy given to each of them will be worth that amount and will be more than the legacy given to the other two; that the legacy given to G. B. Mears will amount in value only to \$1,575.00, while the legacy given to Mrs. Miller, or her heirs, will remain \$1,150.00, the amount mentioned in the will. In other words, the three first named legatees will receive, under the will, \$850.00 in value more than Mrs. Miller or her heirs will receive; the three first named will receive in value \$425.00 more than G. B. Mears will receive under the will; and it is urged upon us that this is an inequality and distinction among the legatees in the amount each was to receive, that the testator never intended to make. It is insisted by

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learned counsel for G. B. Mears and the Miller heirs, that the dominant purpose and intention, and in fact the controlling idea of the testator as expressed all through the will, was to give to each one of the legatees an equal share in his estate, but if it is so construed as to value the legacies given them as of the date of its execution, then this manifest intention of the testator to allow the objects of his bounty to share equally in the distribution of his estate, will be defeated and his purpose thwarted by such construction. A great many cases have been cited by learned counsel, both for complainants and defendants, as authority for the insistence of each one, but, in our experience in trying to construe wills, we have found cases of but little value to us, for the reason that there probably never were two wills written just alike in all their terms and conditions and, as a result of such diversity, it has gotten to be a settled rule that, in the construction of wills, each one must stand on its own bottom and the intention of the testator in each case gathered from a reading and consideration of the whole will. The intention of the testator cannot be learned from a consideration of one clause or paragraph, for his meaning in such paragraph may be explained, or elucidated and made clear by a former or subsequent paragraph of the will. It sometimes happens that different clauses or paragraphs of a will are contradictory and cannot both stand and, for these reasons, it is necessary to carefully consider every part of the will in order to ascertain the intention of the testator.

It can hardly admit of a doubt that the paramount, dominant and controlling purpose and intention of the testator in this will was to give to each of the legatees an equal share in his estate. This intention is clearly manifested in several parts of the will and, certainly plainly indicated in that clause bequeathing to G. B. Mears \$500.00 in bank

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stock and \$575.00 in money, for, in that connection the testator says he does this "in order to make him up equal with the other foregoing named three." It is manifest that he then considered the bank stock worth \$115.00 a share, for at that value the \$1,000.00 was worth on the market \$1,150.00, and the \$500.00 stock given to G. B. Mears was worth on the market \$575.00, and this value added to the \$575.00 in money bequeathed to G. B. Mears makes his legacy in value \$1,150.00. The intention to give to each an equal share, or to make the legacy to each equal in value, is further clearly indicated when we consider the amount bequeathed to the Miller heirs. While no bank stock is given to them, they are given \$1,150.00 in money, "to make her and her heirs up equal to the amount that I give to the first four heirs." It is thus seen that the dominant purpose of the testator was to equalize the legacies given to each of the objects of his bounty. When we come to consider the residuary clause in the will, his purpose to give each of them an equal share of his estate is further made clear, for he directs his executor to sell all the remainder of his property and to divide it "equally between the five within named heirs to my estate, share and share alike." It was clearly the intention of the testator to give to each of the legatees a legacy of equal value, and to divide the remainder of his estate among them equally, "share and share alike." There is running all through this will the dominant intention and controlling purpose of the testator to give to each of the beneficiaries under his will, an equal portion of his estate and, in order to carry out this manifest idea and intention, and to give to each of the legatees an equal share, it is necessary that the legacies bequeathed to them be valued as of the date of his death, for, if that is not done, and a value placed on such legacies as of the date of the exe-

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cution of the will, then the controlling idea and intention of the testator, as manifested in his will, will not be carried out. In such a case the legacy given to the Miller heirs will only be worth \$1,150.00; the legacy given to G. B. Mears will only be worth \$1,575.00, while the legacies given the other legatees will be worth \$2,000.00, which will be an unequal distribution of the testator's bounty, directly contrary to the manifest intention that they should share his bounty equally.

The Supreme Court, in *Brown v. Brown*, 86 Tenn., 291, speaking through Mr. Special Justice Neil about the construction of wills, said, "We concede the point that for the purposes of this construction the will must be looked to as matter stood at the death of the testator, when it went into effect," and in looking at matters as they stood when Mr. Mears died, it seems that we would have to take the value of his property at that time in order to give each legatee a share equal in value to that given the others. Something is said in briefs of counsel about whether this bank stock is a general or a specific legacy, and we are inclined to believe that it is not really either. A general legacy is payable out of the general assets of the estate, there being no particular fund designated out of which it is to be paid. A specific or special legacy is a bequest of a specific article of the testator's estate as distinguished from all others of the same kind, and whether the legacy is general or specific depends on the language used in the will. Mr. Pritchard, in his work on Wills, section 461, says, "a demonstrative legacy is a bequest of a certain sum of money to be paid out of a particular fund pointed out by the testator, or of a sum payable out of the proceeds of particular property designated by him." From these definitions of general, specific and demonstrative legacies, it would seem that these bequests of bank stock do not come

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within the definition of either of these characters of legacies. While \$1,000.00 of bank stock in the Bank of Woodbury is given to each of three of the legatees, no specific or particular share of stock is given to either of them. We assume from the whole will that ten shares were given to each of these legatees, but, while so assuming, it is apparent that no special or particular shares are given to them. The same is true as regards the five shares given to G. B. Mears. The will does not provide for the payment of \$1,000.00 to these three legatees to be realized and paid out of stock in the Bank of Woodbury, and, hence, the bequests are not demonstrative. Inasmuch as no particular or specific shares are bequeathed, these legacies are not specific or special.

In *Martin v. Osborne*, 85 Tenn., 424, Mr. Justice Fowlkes quoted from Roper on Legacies, 192, where he designates or terms such a legacy as these now being considered, "a legacy of quantity, in the nature of a specific legacy, . . . a species of legacy between a general and a specific bequest."

It is not, however, very material to consider the nature of these bequests; the all-important point for our determination is whether the value of the bank stock is to be fixed at the date of the execution of the will or at the date of the death of the testator. In the examination of the cases we have been unable to find any fixed rule by which to be guided in construing a will in a matter of this character. Or, in other words, the authorities do not seem to have laid down any hard and fast rule by which to determine when, or at what date, the property bequeathed is to be valued so as to carry out the controlling purpose and intent of equality among the objects of the bounty of the testator as manifested in his will. We apprehend that, if it were necessary in order to carry out such intention, the value

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of the property at the date of the execution of the will would be fixed upon. For instance, if, in this case, the bank stock at the time of the death of the testator, was then worth only \$75.00 a share, had depreciated in value since the will was made, the Courts would then, in order to equalize the shares and the bequests, ascertain its value at the date of the execution of the will.

In *Wirt v. Cannon and Wife*, 4 Cold., 122, it appears the testator who made the will then being construed, had given one of his sons and daughter each a share of land and, in order that full justice might be done to his other son and he made equal with the other two children, he provided that his son should have the money that he, the son, owed his father, the testator. At the death of the testator, the shares of land given to the other son and daughter were worth much more than the indebtedness of the second son, and the Supreme Court held that, this being true, the daughter and son to whom the land was devised, must pay to the other son to whom his debt was bequeathed, an amount sufficient to make his legacy equal in value to their separate devises. It is apparent from the context of the will in that case, that the testator supposed that the debt his son owed him was equal in value to the value of the share of land given to each of his children at the time he made the will; but after his death it was evident that if the son received nothing but the debt he owed his father, he would get less than his brother and sister, and it being apparent that the testator desired each to receive an equal share of his estate, and it further appearing that each share of the lands devised to the brother and sister was greater in value than the debt, the Court held they must pay their brother out of the portion of the estate, or that he must be paid out of the residum of the estate, a sufficient amount to make his share equal to his brother

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and sister and thereby carry into effect the manifest intention of the testator. The Supreme Court said in that case, "equality between the objects of his bounty under this clause of the will, was the primary intention of the testator, . . . and the prime object of the testator will not be defeated, and what he himself declares would be injustice done, because of a misapprehension of the testator, or merely because the particular fund, or assets out of which he directed the legacy should be paid, was sufficient whilst there remains a sufficiency of assets, not specifically devised, to make up the legacy.

In *Dardin v. Harrill*, 78 Tenn., 429, it appears that the testator supposed that a debt of \$1,200.00 that one of his sons owed him, when he made his will, as about equal to the value of the son's share in his estate, but after his death, when it was administered, it was found that the son's share in the estate would not be \$1,200.00, and the Supreme Court held that, "a mistake on his part (the testator) as to the probable quantum of the share of each child cannot possibly be allowed to control the general intent so fully disclosed." The intention of the testator in that case was, beyond doubt, that his children should share equally in his estate, and, inasmuch as that object could not be attained by allowing the son to retain the \$1,200.00 debt he owed his father without paying any part of it, the Court held that he must pay enough of it to render the shares of the other legatees equal to his own.

In *Campbell v. Watkins*, 1 Shannon, 122, the Court held that in order to carry out the manifest intention of the testator to divide his property equally among the legatees, "the letter must yield to the spirit of the instrument so as to carry out the evident intentions of the testator," and, in that case, an advancement of slaves made to one of the legatees was added to the whole estate, but deducted from

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the share of such legatee and the aggregate amount then divided between the two legatees so as to produce equality.

In *East & Collins v. Burns*, 104 Tenn., 169, the Supreme Court held that in order to produce equality among the legatees, it was the dominant, controlling intention of the testator, clearly manifest in the will, that the property devised and bequeathed therein might be valued seven months after his death, although a valuable house had been destroyed by fire after he died and before the valuation was fixed on the assets of the estate. In that case it was insisted by some of the devisees that the value should be fixed as of the date of the death of the testator, before the house had been destroyed. but the Court held that to do so would produce inequality in the division of the assets of the testator, which was contrary to his manifest intention declared in the will, and in order to carry out such intention to divide the estate equally, the Court held that the property should be valued after a part of it had been destroyed by fire, and that which had been destroyed would not be considered in fixing the value.

In none of the cases cited has the Court laid down, as a hard and fast rule, that any particular date must be taken at which the property devised, or bequeathed, should be valued. The main object and effort of the Courts seem to be, first, to ascertain the intention of the testator and then to carry it into effect. It being determined that the testator wanted his estate divided equally between his children, then the Court take such date to fix its value as will carry out the will of the testator, and divide it equally between the objects of his bounty. If it were necessary to take its value at the date the will was made, in order to equalize the legacies and thereby carry out the controlling intention of the testator, the Courts would not hesitate to do so. It is likewise true

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that, if necessary to carry out the intention of the testator and to give to each legatee an equal share of his bounty, to fix a value on his estate at the date of his death, or a reasonable time thereafter, the Courts would not hesitate to take its value at such date.

In the case under consideration, it being apparent that the testator's wish and desire was that each of his legatees should receive an equal share of his estate, and it not being feasible to carry out that intention unless the value of his estate is taken as of the date of his death, and it being the duty of the Court to carry out his intention if it can be done without contravening any fixed law or public policy, we see no escape from our duty in this case, in holding that the value of these legacies must be fixed as of the date of the death of the testator. The proof shows that the market value of the bank stock is \$200.00 a share, and in equalizing the shares of these legatees, the value of this stock will be fixed at these figures, and G. B. Mears and Mrs. Miller, or her heirs, will be paid out of the residum a sufficient amount of money to make their legacies equal in value to that of the three other legatees; that is, G. B. Mears will receive in addition to the five shares of stock and \$575.00 in money, \$425.00 in money out of the residuary estate; and Mrs. Miller will be paid by the executors \$850.00 out of such residum, and in this way the shares of each of the legatees will be equalized as the testator manifestly intended they should be, and it results that the decree of the Chancellor is, in all respects, affirmed with costs.

The costs of the cause, as well as of this appeal, should be paid out of the assets of the estate.

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CHATTANOOGA STATION CO. v. R. C. HALL.

Affirmed by the Supreme Court, at Knoxville, 1914.

1. **MASTER AND SERVANT.** *Liability of master to third parties for a wilful act of servant.*

The general rule is that the master will not be held liable for the wilful acts of a servant unless committed under the master's direction or consent or within the scope of the servant's employment.

2. **SAME.** *Scope of employment. Carrier or depot owner as master.*

But when the liability of the master who is a carrier of passengers or the maintainer of a passenger station is involved, the scope of employment of the servant is, with respect to parties sustaining a contractual relation with the master, of wide application.

3. **SAME.**

With respect to passengers and invitees at passenger station grounds, it is a duty owing by the master through every servant to accord proper treatment and care, and especially to refrain from inflicting personal injuries. A violation of this duty upon the part of any servant placed about the station for the purpose of fulfilling any of the requirements of the carrier or the owner of a passenger station subjects the latter to liability, whether the infliction of injuries be wilful or merely negligent.

4. **SAME.** *Rights of party accompanying intending passenger.*

The son-in-law of an elderly lady who accompanies the latter to a passenger station for the purpose of assisting her in reaching a train upon which she is to depart is on the station grounds by invitation of the owner, and is in position to exact proper care and treatment from all the servants of the master who are assigned to duty at that station.

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5. PRACTICE. *Immaterial errors. Reversal.*

Where the right of plaintiff below to a substantial recovery can never be successfully disputed, and where the amount of damages awarded is not in any respect excessive, the judgment of the lower Court will be affirmed, notwithstanding some errors committed during the trial.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County. NATHAN BACHMAN, Judge.

NEAL THOMPSON for Plaintiff in Error.

TATUM & THATCH for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is an action by Hall to recover of plaintiff in error damages for humiliation and personal injury received in the main at the hands of a gatekeeper at Chattanooga in January, 1913. There were verdict and judgment for plaintiff below. The Station Company sought a new trial, and failing to secure one, has appealed in error to this Court. Because of the view which we take of the controlling questions in this case, it will be unnecessary to treat of the many assignments of error separately. The first, fourth, fifth, seventh and tenth assignments of error may be considered as raising the question as to the correctness of the action of the Court in submitting the issues to the jury, and declining to direct a verdict. We shall consider assignments Nos. 2, 3 and 6 as presenting questions which may be treated as immaterial or collateral to the principal point in controversy.

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The assignments of error predicated upon the overruling of the demurrer and the failure of the Court to direct a verdict, so earnestly pressed upon us, are to the effect that neither in the declaration nor in the evidence was there averred or shown a case of responsibility upon the part of the plaintiff in error for the acts of its gatekeeper, Lawson. A brief reference to the facts alleged in the declaration and shown by the proof will bring out clearly the point as to whether plaintiff in error as master can be held for the wrongs inflicted by Lawson. The latter was gatekeeper or guard at the fence maintained by plaintiff in error between its station rooms and platform and the tracks upon which passenger trains were placed for the reception of passengers. In this fence or barred enclosure is a gate at which Lawson was placed for the purpose of admitting those who intended to take passage upon the trains. It was, we shall presume, his duty to admit those only who had tickets or passes or other evidence of the right to go upon the passenger trains which came into and departed from this station. Plaintiff in error conducts a passenger station for the benefit of four or five railroads engaged in passenger service in and out of Chattanooga. It performs in all respects the functions of a depot or station owned and operated by a railway system for the reception and embarkation of passengers. Lawson had for some months been engaged to discharge the duties hereinabove described. He occupied more the position of an inspector, guard and watchman than any other. At the same time he might be looked upon as the agent of the Station Company, who, in turn, was acting for the railway companies in admitting passengers to coaches and excluding therefrom those who were not entitled to this privilege or to passage. The Station Company was chartered for the purposes hereinbefore indicated.

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On the first day of January, 1913, Hall went to the station in company with his mother-in-law for the purpose of seeing her off upon one of the trains which, according to schedule time, left the station about six o'clock. She was a lady some 56 years old and more. She had a pass which entitled her to passage over a Southern train going to Rome, Georgia. They approached the gate at which Lawson was stationed and made inquiry about the Rome train, and were informed that this train was thirty minutes late. Hall assisted his mother-in-law to the waiting room and remained with her about twenty minutes. He got up and again approached Lawson at the gate, and repeated his inquiry. Lawson angrily replied that he had told him that the train was thirty minutes late. Hall thereupon turned around, stating at the time that he would make inquiry of someone else. Lawson thereupon began climbing over the fence, at the same time cursing Hall and threatening to break his head. He succeeded in getting over the fence; and, arming himself with a stick or a club of some sort, followed Hall about twenty-five feet and struck him a severe blow. It was aimed at Hall's head, but he intercepted it by throwing up his arm. This took place beneath the shed of the station and in that space between the picket fence and the waiting room. Hall appealed to a policeman nearby for protection, but the latter declined to assist him; on the contrary he threatened to arrest Hall instead of Lawson. Hall's mother-in-law had a pass which entitled her to ride upon the train about which he had made inquiry. She was alone but for the presence and assistance of Hall. His object in going to the station was to assist her upon the train and to arrange for her journey.

It is evident from the foregoing that the assault of Lawson was willful and wanton. There was no justification for his conduct, nor sufficient excuse for his outburst

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of temper. Railroads are aware of the question-asking propensity of the traveling public and of their impatience; and they should select servants who will reasonably control themselves; but this is more a moral than a legal duty. This statement of the situation and the happenings brings up the insistence of learned counsel that the act was purely personal upon the part of Lawson and was not in the line of his duty nor within the scope of his employment, and that the Station Company cannot upon any known rule of law be held responsible therefor.

We have given this question the most serious consideration, that consideration which a very able brief, supplemented by a strong oral argument, always calls forth. We have felt ourselves constrained to the conclusion, after mature deliberation, that the declaration averring these facts sets forth a cause of action against the Station Company, and that the trial Judge could have well so stated to the jury. In fact, we feel ourselves driven unavoidably to the conclusion that a case of absolute liability upon the part of the company was presented and that the trial Judge could have well so stated to the jury. In truth, we are so far persuaded of the soundness of this position as to hold as harmless and as immaterial from the standpoint of plaintiff in error some errors that were mitted in the lower Court. Hence, notwithstanding the failure of the trial Judge to try the case according to the law or in accordance with the proper theory, we do not think that a new trial would avail plaintiff in error anything. In other words, if our views of the law as hereinafter announced are correct, the plaintiff below will always be entitled to a substantial verdict; and the errors complained of should be classed with the harmless ones contemplated by Acts of 1911, chapter 11.

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If we assume as sound the position that in order to recover it was and is incumbent upon Hall to show that Lawson assaulted him while in the discharge of his duty or within the scope of his employment, still there would be liability. It is undisputed that he was a guard at the gate, required by his master to admit or exclude people who were there demanding admission.

Custom has made it his duty to answer questions with reference to the arrival and departure of trains. It was his duty, delegated to him by his master, when Hall approached him the second time, to have responded in a reasonably civil way, or at least to have refrained from using insulting and humiliating language. At all events, it was his duty, a duty owing by his master through him to Hall (assuming that Hall was rightfully there) to see to Hall's personal safety, and to refrain from inflicting personal injury. Instead of discharging this duty he became angry and either began or allowed himself to be embroiled with Hall while standing at his post and discharging his duty. This was the beginning of his wrongful conduct, the inception of his breach of duty. When he followed Hall a few feet away and inflicted personal harm, he was following an impulse or carrying out an imbroglio which began at his proper place and while discharging his duty. There was not such a stepping aside from his line of employment as to excuse his master. This has been so held by this Court in two or three cases which have been affirmed by the Supreme Court, particularly a street car case coming up from Memphis, and decided at the last term of this Court at Jackson. It is in accordance with the views of other jurisdictions. See *Wise v. Railway Company*, 91 Ky., 537. Plaintiff below, even under a very narrow view, made a showing which required submission of his case to the jury.

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While we are of opinion that plaintiff in error was liable or is liable even if it be conceded that there had been what learned counsel insist was a departure by Lawson from his line of duty, we assert that there was no departure in legal effect. With respect to Hall, he was within the scope of his employment, that is, in the discharge of or disregard of a duty which was owing by the master at the time Hall was injured. It would be profitless for us, an intermediate Court, to refer to and discuss the great number of authorities brought to our attention to support the proposition that the master is not liable for the willful and wanton acts of a servant not committed within his line of employment or duty. They are quite numerous and very respectable indeed. But they are subject to the criticism that they dwell too much upon line of employment or scope of employment without due regard to an absolute obligation which a master sometimes owes through every servant to a person within his gates. In other words, every servant, both high and low, may with respect to some people, be under obligation, through and from the master, to observe a certain line of conduct; and the master may be held liable for this breach of duty by a servant upon the theory that every servant is, while on the premises of the master, discharging continuously a certain duty to others. The Courts of this State have, since the case of *Springer v. Smith*, 16 Lea, 498, paid very little attention to the scope of employment theory when dealing with actions by passengers against carriers for the willful torts of their servants. See also *Traction Co. v. Lane*, 103 Tenn., 36, and *Neville v. Railroad*, 126 Tenn., 96; and Tennessee is regarded by the annotators of the L. R. A. series as among those States which hold to the doctrine that the master owes it to a passenger or one having the rights of a passenger the duty, through every servant, of seeing that

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reasonable treatment is accorded, and that his personal security is guarded. See also *R. R. v. Ray*, 17 Pickle, 1. The older Tennessee cases, namely, *Purveyor v. Thompson*, 5 Hump., 399; *Caldwell v. Cantrell*, 3 Head, 472; *Sewart v. Rogers*, 6 Heisk., 119, and *Deikl v. Ottenville*, 14 Lea, 194, while sound with respect to their facts, are not applicable to cases of injured passengers or invitees against railways. All these cases and some others were reviewed by this Court at Jackson, Tennessee, in the case of the *Memphis Packet Co. v. Sufer*. It must not be forgotten that this is not a new rule in Tennessee. The decision in *R. R. v. Ray*, *supra*, can be sustained upon no other theory; and that case cannot be successfully assailed. Nor is this out of line with what we conceive to be the sound and prevailing rule in this country. For instance, in *R. R. v. Cooper*, 6 Ind. App., 202, it is stated that it is the duty of a carrier to protect passengers from injury from all servants, and that it will be unnecessary for a Court to make nice discriminations for the purpose of determining whether the wrongdoing servant was discharging a duty intrusted to him by the master. To the same effect is *R. R. v. Kelly*, 47 Am. Rep., 149. And see extensive note to *Daniel v. R. R.*, 4 L. R. A. (N. S.), 483, 503.* Also *Wise v. St. R. R.*, *supra*; *R. R. v. Baird*, 54 L. R. A., 52; *Dickson v. Waldron*, 24 L. R. A., 488; *Higgins v. Railway*, 7 Am. Rep., 298; *Railroad v. Flexman*, 42 Am. Rep., 381; *Mulligan v. Railroad*, 14 L. R. A., 91. The cases last cited are quite appropriate. They sustain the proposition that a carrier upon whose coaches or upon whose premises a party comes rightfully is bound to see that every servant accords him fair treatment and to aid in making the passenger or invitee safe and to refrain from willfully injuring him. As expressed by some of them, it is the duty of the master to

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see that every one of his servants, while on the premises or carriages in the discharge of their respective duties, whatever they may be, shall refrain from inflicting personal harm upon another.

Much was said by learned counsel to the effect that the duty of plaintiff in error could at most be that of ordinary care, and that this was discharged when it exercised ordinary prudence in engaging and retaining servants. That is not the criterion when it comes to the question of liability upon the part of carriers. If the master be liable for the negligence of a servant, he is also liable for the willful act of the servant committed at the same time: *Mulligan v. Railway, supra*. In other words, if plaintiff in error can be held liable if Lawson had, while discharging his duty of gatekeeper, negligently injured Hall, the master can be adjudged responsible for an act willfully committed by Lawson at the same time and place.

Sound to the core is the rule that when a passenger or a person entitled to the rights and considerations of a passenger goes upon the premises or enters the carriage of a railway he has the right to expect fair treatment from every servant and reasonable efforts upon the part of every servant to see that his person is reasonably secure. He has the absolute right to demand this from the owner and to censure him if the latter, instead of discharging this duty personally, reposes it in servants stationed upon the premises. See 17 Eng. Rul. Cas., 275; *Rounds v. Railroad*, 21 Am. Rep., 597; *Crocker v. Railroad*, 17 Am. Rep., 502; *Railroad v. Floxman*, and *Dickson v. Waldron, supra*.

Recurring to the case at bar, it was the duty of plaintiff in error to accord passengers and those possessed of the rights of passengers fair treatment. This was a duty which certainly was owing by and through a servant occupying the important position held by Lawson. It was undoubted-

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ly a right which a passenger would have had while lawfully at the station or at the gate or between the gate and the waiting room; and we have no hesitancy in holding that in harmony with the rules established in this State, plaintiff in error as master was liable for the tort committed by Lawson, and that the Court was not wrong in overruling the demurrer and submitting the question to the jury, provided of course Hall sustained such relation to the company as to have the right to invoke this freedom from injury.

Passing to this question, we shall briefly state our conclusion that he was on the premises by invitation of the company and in the interests of the company and that the company can neither treat him as a trespasser nor bare licensee nor assert that it owed him no duty which was violated by Lawson. The authorities are to the effect that a party who accompanies an intending passenger to the station, especially a woman, for the purpose of assisting her into a coach, is entitled to the rights enjoyed by a passenger: *Packet Co. v. Hilson*, 11 Pickle, 1; *Gilson v. Railroad*, 98 Am. Dec., 321. But whether we are justified in going to that extent or not, we are warranted in the assertion that such a party is entitled to ordinary care and considerate treatment at the hands of the station agent and subordinates while discharging their duties in and about the station: *Railroad v. Lawton*, 15 L. R. A., 434; 33 Cyc., 762, and 805. And we are of the opinion that included in the obligation of the master is that of seeing that his servants do not injure the one who thus accompanies a departing passenger.

The common law, rich in analogy, furnishes evidence of the rule from other relations and situations. Some of the authorities refer to this obligation to be similar to that owing by innkeepers to guests. In the latter case the mas-

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ter is responsible for injuries willfully inflicted by a servant: *Curran v. Olson*, 88 Mich., 307; *Overstreet v. Moser*, 88 Mo. App., 72. And the case of *Dickson v. Waldron*, *supra*, is also instructive and apposite, in that it is held that all persons who invite customers and guests indiscriminately are bound to see that their servants refrain from injuring those thus invited. The same doctrine is announced in the very interesting Indiana case of *Brooks v. Fair Assn.*, reported in 73 N. E., 351. It is unmistakably asserted, and it seems with unanswerable logic, that the owner of a building to which place people are continually requested or invited to come for the transaction of business or for enjoyments and privileges offered by the owner, is bound to see that the invitee is protected from personal violence, especially at the hands of his own servants.

We deem it unnecessary to discuss that feature of the case wherein learned counsel for Hall undertook to predicate liability upon the conduct of the policeman. This was not essential to a right of recovery. But notwithstanding, the fact that this man was dressed up in policeman's clothes and was commissioned by the city, would not relieve plaintiff in error from responsibility if the man was employed by plaintiff in error and paid by it and was under its control: *Railroad v. Flexman*, 42 Am. Rep., 231.

Nor need we discuss the question as to whether plaintiff in error was aware of the reputation of Lawson for violence. This was relevant, but not controlling. It is apparent from the foregoing that we would hold the company bound for his acts whether his reputation was that of an exemplary man or that of a bully.

It is also plain that we are not called upon to discuss the vast number of cases dealing with the question of reasonable care in the employment of servants. Whether we

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predicate liability upon the narrow or the broad view of the words, "scope of employment," we are persuaded that the verdict in this case is sustainable.

After such investigation as our limited time and opportunity will permit we feel satisfied that no injustice was done plaintiff in error, and that the small verdict of \$500.00 should remain undisturbed. All assignments of error are overruled and this judgment is affirmed with costs.

J. G. WILSON v. WOOD LUMBER COMPANY.

Writ of certiorari denied by the Supreme Court,
at Knoxville, 1913.

1. CERTIORARI TO JUSTICE OF THE PEACE. *Hearing of motion to dismiss. Matter of abatement. Absence of bill of exceptions.*

When the action of a Circuit Judge in sustaining a motion to dismiss a petition for a writ of certiorari both for lack of sufficiency and because the statements are untrue is assailed, the presumption will be indulged in the absence of a bill of exceptions that the judgment of the Court was correct.

2. SAME. *Sufficiency of reason for not appealing.*

The averment in a petition for certiorari that the petitioner would have perfected his appeal from a justice within two days but for the fact that he got lost in returning to his home and did not reach his home until too late at night, because of his physical weariness, to go to the home of a justice two miles away and perfect his appeal is insufficient.

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3. JURISDICTION. *Action of negligence. Local or transitory.*

It is held that an action of negligence as contradistinguished from trespass is transitory, although the damages consist of burning grass, lumber and rails on the farm of the plaintiff.

FROM JOHNSON COUNTY.

Appeal in error from the Circuit Court of Johnson County. DANA HARMON, Judge.

H. T. CAMPBELL for Plaintiff in Error.

LEE F. MILLER, DONNELLY & DONNELLY, W. F. TAYLOR and N. J. BLACKBURN for Defendant in Error.

MR. JUSTICE CATES, a former member of the Court, delivered the opinion, inserted by request.

THIS action was begun by the plaintiff below before a Justice of the Peace of Johnson County to recover of the defendant damages for the alleged negligent, careless and wrongful conduct of the defendant in permitting sparks to escape from an engine, thereby setting fire to rails, fences, crops and timber on plaintiff's land to his damage \$450.00.

The warrant is addressed to the sheriff or any lawful officer of Johnson County, to execute and return. The warrant was executed on the defendant by service upon its agent, T. B. Bledsoe, in Carter County, Tennessee, by W. T. Crosswhite, deputy sheriff. It does not appear whether Crosswhite was a deputy sheriff of Johnson County or Carter County.

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The defendant filed a plea in abatement to the plaintiff's action, averring, in substance, that it was a non-resident of the State of Tennessee, with its principal office in Carter County, Tennessee; that at the time of the service of process in this case it did not have, nor had it ever had an office or agency in Johnson County, Tennessee, nor was it, or any of its agents, temporarily or otherwise at the time of the bringing of this suit in Johnson County, and it pleads therefore to the jurisdiction of the Justice, and prays that the suit be abated.

Upon the hearing of this case before the Justice of the Peace he dismissed it for want of jurisdiction of the defendant.

The Justice's judgment was rendered on the 3rd day of September, 1910.

On the 14th day of October, 1910, the plaintiff filed a petition for a writ of *certiorari* to remove the case to the Circuit Court of Johnson County, and in his petition he gives as a reason for his not appealing the case, that the case was tried on Saturday, September 3, 1910, and the petition avers that "Your petitioner went to Mountain City on the following day to consult his attorney, who advised him to appeal the case to the Circuit Court of Johnson County." He says that having two whole days in which to pray and perfect his appeal, he started home, after consulting his attorney, and to the home and office of the Justice of the Peace for the purpose of perfecting his appeal, but in going home he got lost in the mountains, and, after a hard struggle, reached home after eleven o'clock that night, too late to go to the home and office of said Justice, who, he says, lived about two miles from his home. He says he was so tired when he reached home that night that he doesn't believe he could have walked the additional distance required to have reached the Justice's office.

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The writ of *certiorari* was granted by Judge Harmon, and the case was removed to the Circuit Court of Johnson County in the usual way.

The defendant in error filed an answer to the petition, denying the several allegations therein contained, but it is unnecessary to notice this answer as it is not involved in the question here raised.

Before answering the petition, however, the defendant in error entered a motion to dismiss the petition and writ on three grounds—

(1) That the petition does not show sufficient reasons for not appealing, and does not aver that the petitioner was deprived of his right of appeal by the wrongful act of the Justice of the Peace before whom the case was tried, or by the wrongful act of the defendant.

(2) That the petition does not show sufficient reason why the case was not appealed on Tuesday, September 6, 1910, upon which day the petitioner had a right to appeal, and that, therefore, his petition should be dismissed.

(3) That the petition was not verified before the proper official; that it was sworn to before a notary public, when it should have been sworn to before the Judge, Circuit Court Clerk, or some Justice of the Peace.

On the 2nd day of May, 1911, the case was heard before the Circuit Judge, and by consent the case was heard on the motion to dismiss the petition and writ, defendant's answer to the petition, and the plea in abatement filed before the Justice of the Peace, and upon a consideration of all of which the Circuit Judge was of opinion that the plea in abatement was good, and he sustained the plea and dismissed the suit, taxing plaintiff in error with the costs.

Motion for a new trial was made below and overruled, and the case is in this Court by appeal in the nature of a

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writ of error, and the plaintiff in error assigns the following errors:

(1) The Court erred in holding that the action was transitory, and not local, and upon that ground dismissing plaintiff's suit.

(2) The Court erred in sustaining defendant's plea, without replication, and hearing proof.

We will dispose of these two assignments of error together.

It is true that there is no bill of exceptions in this case, showing upon what facts the Court based its judgment, the judgment of the Court merely reciting that the case was heard by consent upon the motion to dismiss, answer to the petition and plea in abatement.

In the absence of a bill of exceptions this Court will presume that the judgment of the Circuit Court is correct.

We will presume that there was evidence introduced before the Circuit Judge that warranted him in finding that the plea was true in fact.

In *Wright v. Redd Bros.*, 22 Pick., 719, it was held that in the absence of a bill of exceptions, the presumption is indisputable in this Court that the conclusion reached by the jury is that which the evidence required.

The above proposition is also supported by *Scruggs v. Heiskell*, 11 Pick., 455, and *Pratt v. Gillespie*, 13 Pick., 217.

In the latter case the case was tried by the Circuit Judge without the intervention of a jury, as in this case.

Numerous other cases could be cited in support of this contention, but these are sufficient.

As to the sufficiency of the plead in law, we are referred to *Railroad v. Weeks*, 13 Lea, 149, in which the damages complained of were similar to the ones complained of in

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this case, and the fire was alleged to have originated as the result of the negligence of the defendant.

The defendants filed a plea in abatement, setting up the fact that service was had on the defendant in a county other than the one in which the suit was brought, and that the action was a transitory action and followed the person of the defendant.

A demurrer was interposed to this plea and was overruled, and a majority of the Court held that the demurrer was properly overruled and the judgment of the referees so holding was affirmed.

This same ruling has been adhered to in *McCorkle v. Bristol, Elizabethton & Carolina Railroad*, from Carter County, decided by the Supreme Court in 1893. In that case the suit was instituted in Carter County and service had on the defendant in Sullivan County. The plea in abatement was filed, just as in this case, to the jurisdiction of the Carter County Justice. The plea was sustained by the Circuit Court, and, upon appeal to this Court, the judgment of the Circuit Court was affirmed.

The gist of the action is negligence as distinguished from actual trespass, and we presume that these cases rest upon that distinction.

So we are of opinion that these assignments of error must be overruled.

We are further of opinion that the judgment of the Circuit Judge in dismissing the case was proper on another ground. The motion to dismiss the petition and writ should have been granted for the reason that, in our opinion, the petition does not assign any good ground for the failure of plaintiff in error to appeal.

As before stated, this petition stated that "the petitioner went to Mountain City on the following," something seems

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to be omitted after the word following. The trial having occurred on Saturday, he probably meant to state that he went to Mountain City on the following Monday to consult his lawyer as to the advisability of appealing his case, and the answer and motion of the defendant in error treats the allegation as being that he went to Mountain City on Monday following the trial on Saturday. If this is true, his getting lost on his way home and not reaching home until about eleven o'clock on Monday night, would not excuse him from going to the office of the Justice on Tuesday and perfecting his appeal, and he nowhere attempts to give any excuse for not so doing. If he meant to say in his petition that he went to Mountain City on the following Tuesday, the last day on which he had to appeal his case, to advise with his lawyer, and in consequence of having gotten lost on his return, and was thereby prevented from reaching the office of the Justice in time to perfect his appeal within the two days, he shows lack of diligence.

It appears that the writ of *certiorari* was issued upon the pauper's oath. Presumably he would have taken the pauper's oath in lieu of bond, in the event of appeal. That being true, we are unable to see why he could not have perfected his appeal within the time allowed therefor by law, and his excuse fails to satisfy us that he used reasonable diligence in perfecting his appeal, and, as before stated, the Circuit Judge might have sustained this motion and dismissed his suit for this reason.

So, if the action is not transitory and the plea in abatement is not sufficient in law, we think that the judgment of the Circuit Court can well be rested upon the motion to dismiss.

We are of opinion, therefore, that there is no error in the judgment of the Circuit Court dismissing the plaintiff in error's suit, and its judgment is affirmed with costs.

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OSCAR CLEMONS v. ILLINOIS CENTRAL R. R. COMPANY.

Affirmed by Supreme Court, at Jackson, 1914.

RAILROADS. *Liability for willful or negligent conduct of engineer in frightening animals on the track and running toward trestle.*

A declaration which avers that stock of plaintiff were discovered by an engineer to be on the railway track, and that they had become frightened at the train and started down the track toward a bridge or trestle, and that the engineer continued to run his train after the animals without slackening or stopping, knowing that the animals were running toward the trestle and would run into it if they continued, sets forth a good cause of action, and demurrer thereto should not have been sustained.

FROM GIBSON COUNTY.

Appeal in error from the Circuit Court of Gibson County. T. A. HARWOOD, Judge.

DEASON, HOLMES & ELDER for Plaintiff in Error.

JAS. T. RHODES for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS suit was brought by plaintiff in error to recover damages from the defendant in error for fatally crippling some live stock and permanently injuring others, the property of plaintiff in error, by negligently and wrongfully,

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by one of its passenger trains, causing the stock to run into a trestle on its road.

There was a demurrer to the declaration filed in the case which was sustained and plaintiff in error appealed in error to this Court.

The declaration, after stating the corporate character of defendant in error and that it owns and operates a line of railroad across Gibson County, this State, avers, in substance, that on the night of December 7, 1912, two mares, two fillies, and two colts belonging to plaintiff in error got out of his field and upon the track of defendant in error some distance southwest of the town of Reeves, and were injured in Obion County, Tennessee in the following manner:

As passenger train No. 134 of the company approached the town of Reeves in Obion County, Tenn., from the southwest and at a point about 500 yards southwest of a trestle on its road, the live stock above mentioned appeared on the track of the company a short distance in front of the approaching train and they made no effort to stop the train, and notwithstanding the stock did not get off the track, but run ahead of the train toward the trestle about 450 yards to the northwest, the location and character of the trestle being well-known to those in charge of the train, and still they made no effort to stop the train and no attempt to drive the stock from the track; but, on the contrary, rapidly pursued the stock, giving them no opportunity to leave the track until said stock ran into the open trestle on the track of the company.

The declaration then avers that, from the point from where the stock was first seen by those in charge of the train to said trestle, is a distance of about 500 yards, and that for all of that distance the company's right of way is fifty feet wide on either side of its track, and if the

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train had been stopped so as to give the stock an opportunity they could have left the track and found safety on the right of way, and the stock would not have run into said trestle, if the train had been stopped to give them an opportunity to leave the track, or if the train had been stopped and any effort had been made by the servants of the company in charge of the train to drive the stock from the track.

It avers that as a result of being driven into the trestle, one of the mares, one of the fillies, and one of the colts were so badly injured and crippled that the servants of the company killed them, and the other mare and colt were badly and permanently injured and crippled.

It is further averred that all of said stock stopped just before they attempted to cross the trestle and the train could then have been stopped and the stock driven from the track, but no effort was made to do so by the servants of the company in charge of the train.

It is averred that the negligence of the company's servants in not stopping the train and driving the stock from the track was the sole and proximate cause of the injury to the stock as before set out.

The damages at put at \$1,000.00.

The declaration was demurred to on these grounds in brief:

1. The declaration states no legal cause of action against demurrant, in that, it fails to allege that the animals of plaintiff in error were struck or damaged by coming in collision with the front of the train of demurrant.

2. The negligence complained of in the declaration is not such negligence as makes demurrant liable under its averments, and it does not allege a failure on the part of demurrant to do anything it is required to do under the

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law to prevent the accident, and the negligence alleged is not actionable.

Boiled down, the demurrer raises the point that the declaration does not state a legal cause of action against the railroad company.

As before stated, it was sustained and the suit dismissed, and plaintiff below excepted and appealed to this Court.

Two errors are assigned.

The first is that the Court erred in sustaining the first ground of the demurrer and the second is, that it erred in sustaining the second ground of the demurrer.

We think the declaration, taking the averments to be true, as we do upon the demurrer, constitutes a good and legal cause of action against the railroad company. The suit is not brought to hold the company liable for failing to fence its road or right of way under the Act of 1891, chapter 101. To recover under that Act, the party suing is required to show that the injury to his stock was the direct result of a collision with a moving train, cars or engine, and if animals appeared ahead of a moving train and ran on to a trestle from which they fell or on which they were injured, the moving train not coming in contact with them, no liability is thereby fixed upon the company under said Act: *Railroad v. Saddler*, 91 Tenn., 508; *Jones v. R. R. Co.*, 20 Pick., 119; 30 Am. St. Rep., 896, and cases cited.

Neither is the case brought to recover on the ground that the railroad company failed to observe the statutory precautions to prevent accidents when an animal, person or other obstruction appears upon the track.

At common law the railroad owed plaintiff in error the duty when it or its servants in charge of its train saw his stock upon its track, to use ordinary and reasonable care

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to avoid injury to them by running its train against them, or by frightening and driving them on to the trestle: *Railway v. Ferguson* (Ark.), 38 Am. St. Rep., 217-221, note, and cases cited; *Memphis, Etc., R. R. Co. v. Kerr*, 20 Am. St. Rep., 159, note, and cases cited.

The case of *Savannah, Florida & Western Ry. v. Geiger*, 21 Florida, 669; 58 Am. St. Rep., 691, is an interesting case in the opinion bearing on the question before us and the full monographic note following the opinion cites many authorities. All the cases held under the common law, or practically all, held that where animals or live stock appear upon the track of a railroad it will be responsible for their injury or death, if negligence on the part of the company be averred and proven: *Savannah, Etc., R. Co. v. Geiger*, 58 Am. St. Rep., 159, note, and cases cited (*supra*); *Chicago, Etc., R. Co. v. Bonnie* (Ill.), 2 Am. Rep., 451; *Comstock v. Des Moines Valley R. Co.* (Ia.), 10 Am. Rep., 23; *Chicago, Etc., R. Co. v. Peckwood* (Miss.), 7 Am. & Eng. R. Cas., 584; *Pittsburg, Etc., Ry. Co. v. Heis* (Ohio), 13 Am. & Eng. R. Cases, 258.

A great many cases hold that where it is shown even under the common law rule, that the animal is injured, a *prima facie* case is made out against the company; but this does not appear to be the weight of authority.

There are authorities which hold that owner of stock, allowing them to run at large is guilty of such contributory negligence as bars his right to recover; but there are many cases in which the evidence is such that the railroad cannot avail itself of this defense and such appears to be the holding of our Supreme Court in the case of *Memphis, Etc., R. Co. v. Smith*, 9 Heis., 860.

It has been held in quite a number of jurisdictions under the common law rule under which everybody was bound to keep his stock upon his own land, that if he suffered them

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to escape and go upon the right of way of the track of a railway Company, the stock were trespassers; and, generally, an owner in permitting them to go at large constituted the proximate cause of their collision with the train and was such contributory negligence as defeated his right to recover for their injury.

On the other hand, in many jurisdictions, and, in fact, in a majority of the States of the Union, the owners of animals were not held guilty of contributory negligence in allowing them to go at large, so as to defeat a recovery for the negligent injury of such animals by a railroad company.

Such is the holding of the Courts in Alabama, California, Florida, Illinois, Iowa, Kansas, Mississippi, Missouri, Montana, North Carolina, Ohio, Oregon, South Carolina, Texas, Washington, and, as before stated, Tennessee.

In the case of the *Memphis & Charleston Railway Company v. Guy Smith*, 9 Heiskell, 860-865, Chief Justice Nicholson, speaking for the Court, said:

“Our statutes in various ways recognize the running out of stock on the commons or range as lawful, and the fact that the owner of a mule permitted him to be out of his enclosure cannot be relied upon, either to defeat the action or in mitigation of damages.”

It is true this case was under the code statute requiring certain precautions to be observed, but in the case at bar, under the averments of the declaration, the owner was not guilty of any negligence with respect to his stock being out from his premises and on the railroad track.

The declaration avers that on the night of December 7, 1912, two mares, two fillies, and two colts belonging to plaintiff, got out of his field and upon the railroad track of the company. This does not imply that he permitted his said stock to run at large.

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The declaration further avers that the servants of the company who were operating the train knew of the location of the open trestle; that the train was a light passenger train; that the animals were seen by the trainmen some 450 or 500 yards from the trestle; that the horses did not get off the track, but continued to run ahead of the train and towards the trestle; that, if given an opportunity, the horses would have left the track; that just before they went into the trestle, the animals stopped, and could have been driven from the track; that no effort was made to drive them from the track; that the train could have been stopped and the horses driven from the track; that the negligence of defendant's servants in not stopping the train and driving the horses from the track was the proximate injury to the animals.

Now, the demurrer admits the truth of each of all of these averments.

We think the declaration, taking its averments to be true, constitute a good cause of action. The result is, the judgment of the Court below sustaining the demurrer and dismissing the suit, will be reversed and the cause will be remanded for further proceeding in accordance with the opinion of this Court.

The railroad will pay the costs of the appeal.

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MARY WALLS v. McCONNELL FURNITURE COMPANY.

1. **VENDOR AND VENDEE.** *Negligence in sale. Liability to guest of vendee for defective article.*

A retailer of an article known by him to be dangerous or defective, or which would have been known had he exercised ordinary care, may be held liable to his vendee or guest for personal injuries sustained because of defects in the article. This is upon the ground of negligence only and not of implied warranty with respect to articles which retailer has bought from wholesalers or manufacturers.

2. **SAME.** *No liability of retailer, when.*

Where it is shown that the retailer has bought the article in question, namely, a porch swing, from a reputable wholesale manufacturer and dealer, and there is nothing in the makeup or construction of the article to suggest to a prudent and careful man that the article is defective, and the retailer has no knowledge of defects, a person injured while using the swing cannot recover damages of the retailer because of defects of construction. The rule might be different with respect to direct sales by the manufacturer to the user.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Part III. T. B. PITTMAN, Judge.

BELL, TERRY & BELL for Plaintiff in Error.

BEN CAPELL for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

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THIS is a suit by Mary Walls, joined by her husband, to recover from the McConnell Furniture Company and E. H. McConnell, damages for selling to Corinne Clark, a defective and unsafe porch swing.

The declaration alleges that on or about June 4, 1913, defendant in error negligently, carelessly, and recklessly sold to Corinne Clark, a neighbor of plaintiff in error, a certain porch swing to be used for the purpose of a porch swing at the residence of said Corinne, and at the time the defendant in error sold the said porch swing the defendant in error knew that it would be used by said Corinne, her family, visitors, and neighbors as a porch swing and they knew at the time that it negligently sold said porch swing to said Corinne, that it was unsafe, defective and dangerous, in this, that the said porch swing was not supported by iron hooks by which it was attached to the ceiling of sufficient strength to support the rod with which the swing was supposed to catch and which said defect was known to the defendant, but was not known to said Corinne nor to plaintiff in error and that by the exercise of ordinary care the defect could have been known to plaintiff.

The declaration avers that plaintiff in error, Mary Walls, who was a friend and neighbor of Corinne, visited the latter and as her visitor she was invited by Corinne to sit in said swing, which she did, and while she was using the swing in a careful and prudent manner, by reason of the defect in it, it fell and precipitated her to the floor of the porch and inflicted upon her severe, serious, painful and permanent injuries.

It is alleged that Mary Walls, at the time of said fall, was several months advanced in a state of pregnancy, that she was made sick, sore, and disabled, and that a miscarriage was brought about on account of said fall, and that

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she was compelled to lie and languish in bed for a long time; that she suffered great physical pain and mental anguish all to her damage three thousand dollars, for which she sues.

The McConnell Furniture Company interposed the plea of "not guilty," and the further plea that the accident and injuries complained of were due to and proximately contributed to by the want of ordinary care on the part of complainant in error.

The case came up for trial in the Court below before a jury in April, 1914, and the jury returned a verdict in favor of defendant in error and the case was dismissed upon their verdict at the cost of plaintiff in error.

They moved for a new trial, which was overuled, and they prayed and were granted an appeal in error to this Court.

They assign the following errors:

1. The Court erred in refusing to direct a verdict in favor of plaintiff below at the conclusion of all the evidence, because the hooks introduced in evidence indisputably showed that defendant in error were negligent, and that the hook which broke was totally insufficient to safely do the work required of it, and it was shown that the swing was installed by defendant in error.

2. The Court erred in refusing to set aside the verdict of the jury and in refusing to grant appellant a new trial, because it was demonstrated to any reasonable mind from an inspection of the hook, which was admitted by defendant to be the hook sold to Corinne Clark, was wholly insufficient to support the weight required of it and its use was grossly negligent.

Defendant E. H. McConnell testified that he was a retail dealer in furniture; that Corinne Clark purchased the

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porch swing from him about June 4, 1913, at the price of three dollars; that the same was delivered by the defendant company and properly installed on the front porch of Corinne.

The evidence of defendant was that he purchased the swing from a reputable manufacturer of porch swings. He purchased a carload of the kind and character of the one sold to Corinne; that said swings were generally sold in all the markets of the country; that he sold four hundred or more of these swings, and that he had no trouble with them; that the chains and hooks were a part of the equipment of each swing.

He further testified that from looking at the hook exhibited in the record as the one that broke, he thought that there was a latent defect in the hook.

It appears that other furniture merchants, who handled the same kind and make of swing and who purchased from the same manufacturer, testified that the manufacturer was reputable, and they gave similar testimony to that above given by Mr. McConnell.

An engineer testified that the tensile strength of a hook of the kind and character exhibited in the record was from eight hundred to one thousand pounds.

It is agreed in the record that the swing in this case properly installed.

Mary Walls, who sues in this case for an injury caused by the fall of the swing, was a visitor of Corinne Clark, and, of course, there was no privity of contract between her and the defendant below.

It is agreed in the record that the Court properly charged the jury. The insistence of able counsel of plaintiff below was and is here that the Court committed error in refusing to direct a verdict in favor of the plaintiff below at the conclusion of the proof, and that the Court

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committed error in refusing to set aside the verdict of the jury and grant plaintiff below a new trial. The negligence upon which the suit is predicated is, that the defendant below negligently sold this swing to Corinne Clark, and that at the time it sold the swing it knew, or should have known, that the same was defective.

Counsel for the defendant below on the hearing of the case insisted that there was no liability on behalf of his client. He based his contention upon the law laid down in the leading case of *Husset v. Case Threshing Machine Co.*, 61 L. R. A., 303. The general rule established by the authorities, as we understand them, is that a contractor, manufacturer or vendor is not liable to third parties, who have no contractual relations with him for negligence in the construction, manufacture, or sale of the article he handles.

Of course, if a party sell an article for a particular purpose, which he knows is dangerous and defective, he would be held liable. It can hardly be said that a swing for a porch is eminently dangerous to life or health, or that it was intended to preserve, destroy, or affect human life.

See, also, the case of *Burkett v. Manufacturing Co.*, 126 Tenn., 4 7.

In this case Chief Justice Neil, speaking for the Court, said, "The general rule is that a manufacturer is not liable to a third person who buys his goods from an intermediate dealer because of the want of any privity between the parties. The rule is different, however, if the manufacturer had knowledge of the defect and put it upon the market in that condition; in that case he is guilty of a fraud and is liable to anyone into whose hands the article falls and who is injured while using it properly. He is also liable to said third person where the article sold is of such a kind as to be eminently dangerous to human life or health,

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also when the article, although not apparently dangerous is known to him to be such, and he gives no notice of its qualities when he puts it upon the market." Citing *Husset v. Case Threshing Machine Co.*, 120 Fed. Rep., 865; 61 L. R. A., 303, note, and case cited.

There was no privity of contract in this case between the defendant company below and plaintiff in error Mary Walls.

The rule above stated with respect to the liability of the manufacturer ought to operate equally, and, perhaps, more strongly, in favor of the merchant who has nothing to do with the making of the article sold and does not observe it until it is made.

The testimony of the defendant below was, that he did not know of any defective condition of the hook, and there is no pretense in the evidence that he had such notice. The Court below, in its charge to the jury, left to it the question as to whether or not the defendant knew, or ought to have known, of the defective condition, or of the insufficiency of the hook. The contention of appellant and her eminent counsel is, that this was error, and that the Court should have directed a verdict in her favor because the broken hook *itself* showed, conclusively, that it was insufficient to safely do the work required of it.

We are hardly able to assent to this contention of learned counsel. We hardly think that the defendant below could be pronounced guilty of negligence, as a matter of law in selling this porch swing to Corinne Clark. It would be rather enlarging the rule of knowledge and of negligent knowledge to say that he knew, from the mere inspection of this hook on this swing, that it was insufficient to hold it up.

There is no reversible error in the judgment of the Court below and it will be affirmed with cost.

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TOM ADAMS v. L. & R. R. COMPANY.

1. MASTER AND SERVANT. *Proof of duties of foremen by inferior.*

A section hand who claims to have knowledge of the duties of the foreman of the crew may testify as to what those duties are. Such evidence is competent. Its weight is for the jury.

2. SAME. *Evidence as to rules. Printed copies.*

Such section hand may also identify and testify as to the printed rules of the company which are distributed among the servants to be read and observed by them.

3. SAME. *Vice principal. Section foreman. Movements of hand car.*

Where it is shown that the complete management of a hand-car furnished a section crew is under the control of the section foreman, a railway company may be held liable for the negligence of the foreman in failing to give an order for the stopping of the handcar, when such an order would have been effectual to prevent injury to a servant of the company who is thrown upon the track in front of the handcar. This would be official and not merely personal negligence.

FROM WILLIAMSON COUNTY.

Appealed in error from Circuit Court of Williamson County. DOUGLAS WIKLE, Judge.

E. M. HEARN and TYLER BERRY for Plaintiff in Error.

R. H. CROCKETT and T. P. HENDERSON for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

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THIS suit was begun in the Circuit Court of Williamson County to recover a judgment for injuries received by the plaintiff in March, 1912, from a handcar which ran over him, severely injuring one of his legs. The case was heard at the April term, 1914, of the Circuit Court, and, after the plaintiff's evidence was completed, a motion was made for peremptory instructions to return a verdict in favor of defendant, and this motion was sustained, the jury so instructed and a verdict returned by it in accordance therewith. Plaintiff moved for new trial, which was overruled, and he has appealed to this Court and assigned two errors. While there are several assignments, there are really only two errors insisted upon.

It appears from the record, that plaintiff was a section hand, working on the defendant's railroad on a section in Williamson and Davidson counties; that he was employed by the section foreman, whose name is Schaffer, and began work for it sometime in September, 1911, and continued in this employment until the date of his injury, which was the 23d of March, 1912. On the date he was hurt, the section force had begun work at some point on the railroad, having been carried to that place on a handcar. It had rained that morning, and after they reached the place of work, it began to rain harder, when the section boss decided that it was raining too much to continue the work, and directed the hands to put the car on the track in order to return to the section house. There were five section hands with this crew and, after receiving the order, they placed the handcar on the track to go to the house, which was in the direction of Nashville. The plaintiff and one Tom Peoples, another section hand, were on the front end of the handcar working the lever, with their backs in the direction the car was moving. The other three section hands were on the rear end of the car work-

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ing the lever with their faces in the direction the car was going. Plaintiff was on the right side of the car as it was moving north. The section foreman, Mr. Schaffer, stood between the front and rear handles of the car, on the right side of it, with his foot close to the brake. This brake was worked by simply putting a foot on it and pressing it down, and if force enough was placed upon it, the car would stop almost instantly. The application of the brake locked the wheels of the car on that side and in that way forced it to come to a standstill. If a medium pressure was applied to the brake, it had the effect of causing the handcar to slow down and gradually come to a stop. The foreman, Mr. Schaffer, had nothing to do with the running, or operation, of the car and, when plaintiff was injured, was not engaged in any work in the operation of the car, but was simply standing on the side where the brake was, holding to a part of the car, with his feet close to the brake. When the car was first started, it moved slowly, but gained momentum as its movements progressed, and after it had run two or three rails' length it began to rain harder, when the foreman ordered the men to move faster. Plaintiff had on a pair of gloves which were wet and slick, the handle of the lever he was working being also wet and slick, and when the foreman gave the order to the crew to hurry up in order to get out of the rain, plaintiff threw his weight on his lever to make the car run faster, and in some way, on account of his gloves being wet and slick and the handle being in the same condition, he was thrown backward off the car and fell on his feet some distance ahead of the car. When he struck the ground he realized that it was necessary to get out of the way of the car at once, and promptly ran backward, thinking the foreman would order the car stopped, or would apply the brake and stop it, but seeing that he was not doing so, and that the car

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would be on him in a moment, he made an effort to get off the track and in doing so fell on his back near one of the rails, when the car ran upon him, striking one of his feet and pressing it back over his head, thus stopping the car himself. He was severely injured and was confined to his room for sometime thereafter, and is now probably permanently injured.

During the progress of the trial, the plaintiff offered to prove by himself what were the duties of the section foreman in regard to the manipulation of the brake and his control of the car, as well as his control and supervision of the section force under him. The plaintiff was asked who handled the brake and whose duty it was to look after it, and stated it was the duty of the section boss, Mr. Schaffer. He also testified that nobody was permitted to ride on the brake side of the car but the section boss, and that it was part of his duty, made so by the orders and instructions of his superior, to apply the brake when any obstruction appeared on the track in front of the car, and to stop it so as to prevent accidents; that he supervised, controlled and bossed the hands while they were actually at work; and that the hands, or those working under the section boss, propelled the car but had nothing to do with the brake or its application, and were instructed and directed by the section boss to have nothing to do with it, and that it was Mr. Schaffer's duty, under his employment with the company, to see after it. He was asked if he knew whose duty it was to look after the brake, apply it and stop the car when it was necessary to do so, and answered that he did; and being asked whose duty it was, said that it was Mr. Schaffer's, the section boss, that his place was on that side of the car where the brake was, that he always stood right over it with his face in the direction the car was going; that his feet should be right by the side of the brake while

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the car was moving; that all he had to do to stop the car was to raise his foot up and slap it on it. The plaintiff testified that the duty of looking after and applying the brake, and the duty of stopping the car, were placed upon the foreman by the company, or his superior officer, and that no other one of the crew was allowed to have anything to do with the brake unless ordered to do so by the section boss.

After all this testimony was heard by the jury, and without the plaintiff being cross-examined in regard to this testimony as to the duties of the section foreman in looking after and applying the brake, defendant's counsel moved the Court to withdraw from the jury all of plaintiff's testimony in regard to the duties of the section boss in reference to the manipulation and application of the brake, and this motion was sustained by the learned trial Judge upon the ground that he hardly thought a section hand would know what were the duties of his boss; and the action of the trial Judge in this regard is assigned as error.

This Court has considered the action of the learned trial Judge in withdrawing this evidence from the jury, and has reached the conclusion that it was error to do so. The plaintiff testified that he had worked for the company with this section force five or six months, and was familiar with the duties of the section boss, and particularly that he knew what his duties were in regard to the brake on the handcar, and without objection was permitted to state these duties. His work with the force for the time stated, necessarily made him, to some extent, acquainted with the duties imposed upon the section foreman by the company, and he said one of these duties was to control and apply the brake when that should be done, and that it was not a part of the duty of any of the sec-

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tion crew. Defendant's learned counsel did not see fit to cross-examine the plaintiff as to his means and opportunity of knowing these facts, but contented himself with simply objecting to his evidence on this branch of the case when the plaintiff had completed his testimony. In answer to a question, plaintiff testified that he knew what the official duties of the section foreman were in regard to the working of the brake, and then proceeded to tell what they were. It may be, upon a cross-examination on this point, it would have developed that he knew but little about these duties, but, in the way he testified, we are of the opinion that his evidence was competent to go to the jury for whatever they might think it worth. The fact that he was a section hand and not likely to be acquainted with the duties of the section boss would only go to the weight of his evidence, and not to its competency. The jury had the right to pass upon his credibility as a witness in this respect, and to weigh his evidence on this important issue of the case. The jury may not have given him much credit, nor his testimony in this regard, much weight, but he is entitled to have it go to the jury to be considered by it for whatever it was worth. If a witness, whatever may be his employment by the company, testify plainly and directly that he knows what are the official duties of his superior, and then proceeds to tell what they are, we know of no rule of law that would justify the trial Judge in holding such evidence incompetent, simply because such witness was only a section hand. If Mr. Schaffer was charged by the company with the exclusive duty of looking after and applying the brake, of handling and controlling the operations of the car and stopping it when an obstruction appeared on the track in front of it, and no employe under him was charged with such duty, and, in fact, was forbidden by the rules of the company to do any of these things, then,

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it seems to us, that, in the discharge of the duties thus imposed upon him, the section foreman, Mr. Schaffer, was a vice principal and represented the master in such matters. For these reasons we think the trial Judge was in error in withdrawing from the jury such evidence.

Again, the plaintiff offered in evidence to the jury, the printed rules of the defendant company, prescribing the duties of its section foremen in regard to the control and operation of its handcars. Objections were made to the introduction of these rules, and the Court sustained the objections and would not permit them to be read to the jury; and his action in this respect is assigned as error.

Under rule 336, the section foremen are required to always accompany their handcars, and are required to use the utmost care in running them over the road, and to keep a constant lookout. There are twelve rules regulating the conduct of the section foremen in reference to their work as such, and also in regard to their management of the handcars under their control.

I rule 211, the section foreman is required, on all occasions, to be vigilant and cautious himself, not trusting alone to signals or rules for safety. It is insisted by learned counsel for the railroad company that these rules have reference to the conduct of the section foreman in regard to the transportation department and not to his work with his hands while they are engaged in the performance of their duties on the track of the company. In many respects this is true, but we think some parts of the rules regulate and control the duties of the section foreman in his management, control and operation of the handcars placed under his care, and for that reason they were competent to go to the jury to be considered by it insofar as the rules prescribed the duties of the section foreman in the handling and control of handcars placed under his or-

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ders and directions. It is, however, insisted that there is nothing to show that these rules were in force at the time plaintiff was injured, and that inasmuch as they appear to have been adopted some years prior thereto, the plaintiff should have offered some proof to show they were in force on the 23d of March, 1912, before they would be competent evidence to go to the jury. There is no dispute about their having been once adopted by the company as its rules. That seems to be conceded, and there is no evidence to show that they have ever been abrogated or repealed. Having once been the rules of the company, they are presumed to continue so until it offers some evidence to show that they have been abrogated, the burden being upon it to furnish such proof.

We think the Court was in error in excluding these rules from the jury, and that whatever parts of them control and regulate the section men in the operation of handcars, and prescribing their duties in regard thereto, is competent evidence to go to the jury to show what Mr. Schaffer's duties were in regard to this particular handcar.

It is next insisted by learned counsel for appellant that, with the foregoing evidence excluded, and admitting that it is incompetent, there was evidence to go to the jury for it to decide whether or not the defendant company, through its vice principal, the section boss, was guilty of such negligence at the time plaintiff was injured, as makes it liable to him for the injury he received; and this assignment requires us to again review briefly the evidence upon this point.

It is admitted, or not controverted, that the section foreman was in charge of the handcar, or in other words, he controls it just like a conductor controls a passenger train. Every man on it at the time was subject to his orders, and

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bound to obey them. It was his duty to stand on the car with his face looking in the direction it was going, and this for the purpose of seeing any obstruction that appeared upon the track in front of the moving car. There is no particular rule, so far as we can see, that required him to order the hands who were working the levers, to stop the car when anything appeared on the track, but, whether there was a rule or not prescribing such duties, it was his duty to stop the car, or order it stopped, as soon as he saw something in front of it which the car was likely to run over. A failure to discharge this duty, it seems to us, is an official act of negligence on the part of the foreman. In the handling and operation of this car, as well as in the control and direction of the men under him who were propelling the car, he was a vice principal, the representative of the company, and in the discharge of such duties, or in the neglect to discharge such duties, he was acting for and as a vice principal of his superior. In discharge of these duties, he was not acting in the capacity of a common laborer, nor doing the work of the hands under his control, but discharging official duties imposed upon him by the defendant company. If the company had charged him with the duty of applying the brake when the car was to be stopped, we think that was an official duty imposed upon him, and was not the work of the servants under him. In other words, in performing these labors, he was not doing the work of a servant, but that of a superior and representative of the company, and was, therefore, not a fellow servant of the men employed under him as was true in the case of *Gann v. Railroad Company*, 101 Tenn., 380. That case holds that, where the section foreman undertakes to perform, and puts himself in position to perform, the work of a fellow servant, he is, as to that particular work, a fellow servant, and his negligence in

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such case is that of a fellow servant and not that of a vice principal, although he may be vice principal generally.

The foreman was not acting in a dual capacity in the control, direction and management of the handcar, and the application of the brake and stopping of the car. That was his own duty and a duty which the men under him were forbidden to undertake to discharge. It was as much his duty, imposed upon him by the company, to apply the brake when he wanted to stop the car, as it is the duty of the passenger conductor to pull the bellcord when he wishes his train stopped. We do not think the line of cases preceding and following *Gann v. Railroad, supra*, and declaring the principal therein announced, are controlling in this case.

But, aside from the question of the dual capacity in which defendant company insists that Mr. Schaffer was acting, it is clear that it was his duty to control the running, operation and stopping of the handcar. In this respect his duties were supreme, and when this man was thrown from the car and the section boss saw him in a position of peril and great danger, it then became his official duty, as the representative of the company and in control of the handcar, to take all necessary and immediate steps to stop it and prevent its running over and injuring the plaintiff, and if he failed to do this, he was guilty of actionable negligence. According to the evidence offered by plaintiff, this foreman was standing with his face towards Adams, saw him when he was thrown from the car, saw his position of immediate peril and danger to his life or limb, and yet, took no steps, whatever, to stop the handcar and prevent it running upon him and killing or seriously wounding him. His failure to do so clearly makes out a case of actionable negligence, unless the proof showed that he took steps to stop the car and prevent the accident

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and his failure to stop it and prevent the injury was without fault of himself. Or, in other words, if, because of the proximity of the plaintiff to the car when he was thrown from it and before it ran upon him, it was impossible to stop it and prevent the accident, then the company would not be liable.

The proof by the plaintiff and one of the crew that was on the car at the time, tends strongly to show that this car could have been stopped if the section boss had simply put his foot upon the brake, as it was his duty to do, and pressed it with sufficient force; that it could have been stopped almost instantly. If these are the facts, then it is clear that the failure of the section boss to discharge this duty, when he saw this man in imminent peril, makes a case of actionable negligence which should have gone to the jury for it to determine what were the official duties of the section boss, and whether, if he had discharged them, the injury to plaintiff would have been prevented, and whether he was guilty of any negligence that was the proximate cause of plaintiff's injury in failing to take immediate steps to stop the handcar and prevent its running upon him and thereby doing him this serious injury.

For the foregoing reasons this case must be reversed and remanded to the lower Court for a new trial, and it results that such judgment will, accordingly, be entered here, and against the defendant company for the cost of this appeal.

Holland v. Railway & Light Co.

J. M. HOLLAND v. NASHVILLE RAILWAY & LIGHT CO.

WRIT OF ERROR AND SUPERSEDEAS. *Petition for. Question determined.*

This Court in passing upon a petition for writ of error and supersedeas will examine the legal questions presented for the purpose of determining whether the questions are material, sound, controlling or debatable. If the questions are clearly adverse to petitioner, the petition will be denied. But if the points are debatable, the writ will be allowed to the end that the questions may be settled upon argument.

2. JOINT TORTFEASORS. *Contribution among.*

Many cases in which contribution among parties jointly sued for a tort is proper and enforceable may be conceived of.

FROM DAVIDSON COUNTY.

Application for writ of error and supersedeas.

JNO. T. ALLEN for Holland.

ROBT. F. JACKSON for the Railway Company.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

APPLICATION for writ of error and *supersedeas*.

This application presents an interesting question, which, insofar as we are at present advised, has not been directly passed upon by our Supreme Court.

In August, 1912, plaintiff in error was coming into Nashville from West Nashville in his automobile on Cedar Street. Two gentlemen were with him in his automobile.

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The Nashville Railway & Light Company has double tracks running north on Twenty-second Avenue in the city, which turn west into Cedar Street at its intersection with said avenue.

It has a track on Cedar Street which connects with its tracks on Twenty-second Avenue as they turn into Cedar Street.

The declaration alleges that the Railway & Light Company, in the management of its car tracks and road bed at and near the intersection of its tracks on Twenty-second Avenue and Cedar Street, negligently and carelessly failed to keep its tracks and the street between and on each side in a proper state of repair; that the metal of the street between the rails of its track and on each side of its rails was worn and material washed away until the rails were from an inch to three inches above the surface level of the street.

It alleges that on the day plaintiff in error was coming into Nashville on Cedar Street from West Nashville in his automobile and immediately preceding the accident to be stated, the Railway & Light Company had one Walter Talley (colored) in its employ greasing its rails from their intersection on Cedar Street and Twenty-second Avenue along and around the curve from Cedar into Twenty-second Avenue, and said Talley was so engaged as the car track curved into Twenty-second Avenue, and, as plaintiff in error was coming into Nashville on his automobile, in a prudent manner and at a moderate rate of speed, and when his car wheels struck said greasy rails instead of mounting them, on account of their elevation above the level surface of the street and their damp or greasy condition, skidded and turned into Twenty-second Avenue, and before he could stop his car it collided with said Talley and injured him.

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Said Talley sued plaintiff in error in the Circuit Court of Davidson County and recovered judgment against him for \$800.00 and the cost. Upon appeal by plaintiff in error to this Court, said judgment was affirmed against him, and he has paid it in addition to fees of attorneys and was out loss of time, etc., etc.

The declaration alleges that the Railway & Light Company was not sued by Talley, but it was notified that said suit was pending, and that plaintiff in error would hold it liable for whatever amount plaintiff in error was compelled to pay as the result of the suit.

The petition alleges that an execution has issued against him for the costs in said case and will be levied upon his property unless superseded.

The Railway & Light Company demurred to the declaration and its demurrer was sustained. Plaintiff in error appealed and his appeal was granted, he being allowed thirty days to give an appeal bond.

It is alleged that petitioner made arrangements to give said bond, but his surety did not appear in time to make it.

The fundamental proposition of the petition is, that there are so many exceptions to the rule, that there can be no contribution among wrongdoers: *Rhea v. White*, 3 Head, 121; *Anderson v. Saylor*, 3 Head, 551, that it can hardly be said to be a rule of law, and that an established exception is, that, when the wrong does not involve moral delinquency or turpitude, but is merely *malem prohibitum*, the law does allow an inquiry into the relative delinquency of the parties and will do justice between them, although both are wrongdoers.

In other words, liability for negligence may be shifted to the party on whom was the primary duty of care.

Stated in another form, the insistence that a party, who by reason of his and another's concurrent negligence, has

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been compelled to pay damages, may recover indemnity, although, but for his own negligence the injury would not have happened, if, at the time it occurred, he could not, and the other party could have prevented it.

It is further insisted that the rule against contribution between wrongdoers applies only to cases where the parties engaged together in doing the wrong.

The question in the precise form in which it is stated in this case has not, so far as we have discovered, been decided by our Supreme Court. The general principle announced by our Supreme Court, it appears to us, is against the contention of plaintiff in error, but in view of the case and the question as presented, as stated, we think the writs should be granted and the party be given a full hearing upon the decision of the case upon all of its aspects.

The result is that the writs applied for will be granted upon the petitioner entering into a bond for \$250.00 conditioned as prescribed by law to pay all costs incident to the granting of the writs.

Fireworks Co. v. Wilson.

ST. LOUIS FIREWORKS COMPANY V. DOROTHY M. WILSON, BY NEXT FRIEND.

Affirmed by Supreme Court, at Jackson, 1915.

1. BUYER AND SELLER OF ARTICLES. *Defective Roman candle. Suit by sub-vendee against manufacturer.*

The purchaser of a package of Roman candles from a retail house cannot maintain an action against the manufacturer for injuries received in the back-firing of the candles because of defective wadding or stoppings in the end of the candle.

2. SAME. *Privity, implied warranty. Sub-vendee.*

It is held that the sub-vendee of an article is not in privity with the manufacturer so as to rely upon his implied warranty; nor can said sub-vendee hold the manufacturer for damages for defective articles sold him by a retailer, unless the manufacturer knew of the defect or unless the article was inherently dangerous. .

3. SAME. *Roman candles.*

Roman candles are not to be classed as dangerous articles in such sense as to make the manufacturer liable to a sub-vendee for a defective one.

FROM SHELBY COUNTY.

Appealed in error from Circuit Court of Shelby County, Part III. A. B. PITTMAN, Judge.

J. W. CANADA for Plaintiff in Error.

BELL, TERRY & BELL and JOHN B. TANSIL for Defendant in Error.

Fireworks Co. v. Wilson.

MR. JUSTICE MOORE delivered the opinion of the Court.

THESE two suits were brought to recover damages on account of an injury received by the little girl, Dorothy M. Wilson, alleged to have been caused by the negligent construction of a Roman candle manufactured by the Fireworks Company. There was a judgment for Dorothy in the sum of \$1,000, and also one in favor of Mr. Wilson in the sum of \$650.00. After defendant's motion for new trial had been overruled, it appealed in error to this Court and seeks a reversal of these judgments on account of many errors alleged to have been committed by the trial Judge. Its main insistence in this Court is, that its motion for a directed verdict at the close of plaintiff's proof, and renewed at the close of all the proof, should have been sustained and these suits dismissed. This assignment will first have our attention, for if we agree with learned counsel for appellant, that will obviate the necessity of passing upon the other assignments. In order to determine whether these motions should have been sustained, it becomes necessary to review the facts of this case.

The plaintiff, Dorothy Wilson, is a daughter of her next friend, B. P. Wilson, also one of the plaintiffs, and, on the 24th of December, 1912, was about six years old, and her little brother, Lawrence, about four years old. Her father, B. P. Wilson, shortly before Christmas day, in December, 1912, bought from one C. L. Pankey, at La-Grange, a little town several miles east of Memphis, a package of Roman candles which were labeled with the name of Dixie Factory, Memphis, Tennessee, the package containing fifteen candles, each one with fifteen shots in it. The candles were in the original, unbroken package when Mr. Wilson bought them. He took them home with

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him and placed them on the mantle in the parlor, where they remained until Christmas night. After supper that night, he opened the package, took out two of them and he and the two children mentioned, went to the south side of the house for the purpose of firing them off. He placed one in the hands of Dorothy and the other in the hands of Lawrence, and as they held the two ends together he set fire to the fuse in the candles. After shooting these two candles, it was suggested that they go around on the other side of the house where the neighbors' children could see the fun. Mr. Wilson went through the house, got two other candles, brought them to where the children were and placed one in the hands of Dorothy and one in Lawrence's hands. They then held the ends in which the fuses were together, pointing them at an angle of about forty-five degrees. He stood immediately behind and between the two children, and striking a match fired the fuses of the two candles at the same time. The candles began shooting, and when Dorothy's candle had fired ten shots, it "gave a heavy puff and the flame shot right out under her hand." She had on a heavy sweater which was doubled back about four inches, and the fire cut through her sweater and her dress. She screamed and threw the candle west of her about ten feet and started to run. Mr. Wilson says when this occurred he was "right at their backs, just between them, and could see their hands, to see that they held them right, and I was looking at her hand when it fired backwards in her hand. I was so I could put my arms around their necks; I was right at their backs. When it fired back there was just a heavy puff." The next morning he went to the place where this accident occurred and found the sweater sleeve and the Roman candle which she threw away, lying together on the ground. He picked up the candle and looked down through it, "Just like looking down a breech-loading gun barrel."

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From this examination it was evident that all of the fifteen shots of the candle had gone out of it, and ten of them had gone out of the front end of the candle, and it is supposed, or claimed, that the other five, if there were fifteen shots in the candle, came out of the rear end of it, where it was being held by little Dorothy. The candle that the boy, Lawrence, had fired, was still blocked up, had clay in the end which was held in his hand. It did not act like the one shot by Dorothy, and, presumably, there was nothing wrong in its construction or make-up.

The heavy puff and flame which shot out under her hand, burned Dorothy's wrist and arm to such an extent as to cause her great pain and to require that she be sent to a hospital in Memphis for treatment, where some skin was transferred from her body and ingrafted on the burned portion of her arm. There can be no reasonable doubt on the facts of this case, that she suffered great pain and was compelled to remain in bed several weeks. It is also true that the burn on her wrist left a very ugly scar which will remain for life, and it is for this injury that she brings her suit against the St. Louis Fireworks Company. Her father sues to recover his loss of services and expense incurred in effecting a cure of the injury she sustained.

It seems to be conceded, and we take it there is no doubt, that the St. Louis Fireworks Company, manufactured and put upon the market this particular Roman candle that caused the injury complained of; but it did not sell it to Mr. Wilson. After it made the candle, it and a great many others were sold by the defendant company to W. B. Mallary & Sons Company, wholesale merchants of Memphis, Tennessee, and they were by this firm sold to Mr. Pankey and by him sold to the plaintiff, B. P. Wilson. There is no controversy about these facts, and it is clear that there were no sort of contractual relations between

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the St. Louis Fireworks Company and the plaintiff, B. P. Wilson, or his daughter, Dorothy Wilson. The contract of sale, when one was made, was between the Fireworks Company and W. B. Mallery & Sons Company. There was no contract of sale ever made between the Fireworks Company and Mr. Pankey. There were three contracts made in which this candle was the subject-matter thereof; one between the Fireworks Company and Mallery & Sons Company; one between the latter company and Mr. Pankey, and one between him and the plaintiff, B. P. Wilson. There being no contractual relations between the plaintiff Wilson and the Fireworks Company, there could be, in the very nature of things, no warranty, either express or implied, of the character and quality of the Roman candle, or of its construction, or of its fitness for the purposes for which it was made and sold and for which it was to be used. We do not understand that this cause was tried in the lower Court upon the idea, or theory, or averments of the declaration, that there was any warranty, express or implied, existing between either of the plaintiffs, or both, and the St. Louis Fireworks Company. While there was an amended declaration filed in each case, in which it was attempted to set up and rely upon a warranty of some nature or other, the exact character being uncertain, yet, when the case was tried in the Court below, it was heard altogether upon the theory that there was a liability on the part of the Fireworks Company to these plaintiffs on account of the negligent construction of the Roman candle by the Fireworks Company.

In the first count filed in both cases, liability is predicated alone upon the following averment:

“The said Roman candles were purchased in the original package in which they were put by the defendant for sale,

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and the said injury of plaintiff was due solely and proximately to the negligence of the defendant in the manufacture of said Roman candle, a article imminently dangerous to life and health, and in the manufacture of which defendant was disregardful of its duty to the public, including plaintiff."

It was insisted in the lower Court, and, as we understand, so insisted in this Court, that when the candle in question was made by the defendant company, it was negligently constructed by it so as thereby to become imminently dangerous to any one of the public firing it off, and that the company knew it was so constructed, or, by the exercise of reasonable diligence, care and caution, could have known of its dangerous construction when it manufactured it and placed it upon the market, and for this reason there is a liability on its part to any one who afterwards is injured on account of its faulty construction, when attempting to fire it.

The Fireworks Company, through its learned attorney, insists that, inasmuch as there was no contractual relationship between it and the plaintiffs, there was no implied warranty existing between them; and, hence, no liability upon its part to the plaintiffs, unless the proof should show that, when the company manufactured this Roman candle, it then knew it was imminently dangerous on account of its faulty construction, and knowing this fact, placed it upon the market without notice of such construction to those who would subsequently use it.

It appears from this record that the defendant company owns a large plant, for the manufacture of Roman candles and other fireworks, in the city of St. Louis, Mo. It also owns a plant for the same purpose at Binghampton, a portion, or a suburb of the City of Memphis. That this particular Roman candle was manufactured in its plant at

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Binghampton appears reasonably certain, although there is no direct proof that it was. That fact seems to have been conceded during the trial. Just when this candle was made is not shown by any evidence, though it is treated as having been made sometime in the year 1912, before Christmas of that year. The proof makes it clear that there are manufactured at defendant company's plant at Binghampton, each year, millions of Roman candles, of various and different sizes, some shooting only four shots, others six, some eight and ten and some as high as fifteen shots. The president of this company testified that they manufactured at Binghampton, in the year 1912, over a million Roman candles, which were sold and distributed in the territory under the jurisdiction of the Memphis plant. He indicates in his evidence that there are a large number of factories engaged in making Roman candles and other fireworks used by children and adults in celebrating important events. We gather from the testimony of the president of defendant company that each of these various plants make millions upon millions of them each and every year, and that they are sold and distributed not only in every nook and hamlet, village, town and city in the United States, but in various places throughout the world. If that is true, and we take it that it is, then there necessarily must be not only millions of these candles made every year, but billions of them manufactured and distributed throughout every village, town and city, not only in this country, but in many countries. This president, as well as other witnesses used by defendant in the trial, testified that the machinery used in making Roman candles and the method of making them, is the same in every plant known to them, and the president stated that he was familiar with all of them in the United States, except two on the western coast. While upon the

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witness stand, he and the other witnesses of defendant company, each and all of which were experts in making Roman candles, having had from twenty to thirty years' experience in that business, testified that they never had before, in all their experience, known of a Roman candle acting like this one did when the little girl was injured by it. What it did at the time of her injury is called, by all the witnesses in this record, "back-firing," and each of these witnesses state that in all their experience and observations, as manufacturers of Roman candles, they never heard of one back-firing before. It is stated that they had made diligent inquiry of other manufacturers in order to learn, if possible, if such a thing had ever happened in their knowledge and experience, as a Roman candle back-firing and the universal answer to their inquiry had been that they had never heard of such a thing before.

The plaintiffs do not undertake to prove, except by one witness, possibly two, that such a thing as the back-firing of a Roman candle was ever known or heard of before in the history of such fireworks.

In order to show that there was no way by which to account for the action of the candle in this instance, the defendant placed upon the witness stand not only the president of the company, but some of its employes who actually made Roman candles, and by them showed how they were constructed, the different stages through which they went during construction, and what experiments were made with Roman candles a day or two before the trial in order to ascertain how it was possible, or what caused this Roman candle to act in the manner in which it did. During the trial of the cause the machinery used in making Roman candles was in the court room, and the method of doing so was demonstrated to the jury in order to show the care and caution used by the manufacturers in con-

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structing them. Experiments were made in the presence of the jury in firing Roman candles while loaded or charged in different ways, in order to ascertain what caused this particular candle to back-fire, and also to find, if it could be done, where the faulty construction of it was, if there was any fault in its make.

Learned counsel for appellee makes rather a caustic criticism of these, what he terms, so-called experts. His criticism is predicated upon the idea that these were opinion experts, when in fact, there was no ground or basis for terming them such. The truth is, these witnesses were men of long experience and scientific knowledge in the manufacture of Roman candles, acquired in making them for a period of over twenty years, and what they testified to in the court room were facts, and on but rare occasions did any of them venture an opinion, and for these reasons we do not see that learned counsel was justified in characterizing these men as opinion experts, or treating their evidence as that of such witnesses. They dealt only with facts and testified largely to facts relating to their actual experience in the manufacture of Roman candles.

It is unnecessary to go through with and state all the different experiments testified to by defendant's witnesses as having been recently made before the trial, in order to show that there was no way by which a Roman candle could be negligently made so as to cause back-firing like this one. The proof, to our minds, demonstrates that the back-firing in this instance is unaccountable. Neither of the plaintiffs, nor their learned, able, ingenious and astute counsel, and, in fact, neither the Judge nor the jury were, during the trial, and counsel is not now, able to point out or indicate any defect or negligence in the construction of the Roman candle which caused it to back-fire. In one part of learned counsel's brief, he intimates that prob-

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ably, or rather possible, the clay was out of the end of it. This seems to be based upon the idea that Mr. Wilson found no clay in it the next morning when he picked it up from the ground and sighted through it like he would through a gun barrel. This theory, however, will not do, and counsel evidently so concluded, for the reason that, the uncontradicted proof shows, if the clay was out of it, the powder and star next to it would also fall out of the case. No facts have been offered to the jury to explain wherein the Fireworks Company was guilty, in its construction of this candle, or of any negligence that caused it to back-fire.

It is said by learned counsel for appellees, and it is ably pressed upon us, that it was the duty of this company, when it made this Roman candle, to know that it was so constructed that it would not back-fire and do an injury to those who used it. It is earnestly pressed upon us, that this company was charged, under the law, with the knowledge of the faulty construction of this Roman candle and that if it did not know this fact, by the exercise of reasonable and ordinary care, it could have known it, and is, therefore, charged with knowledge of these facts. This argument, if sound, places upon every manufacturer of Roman candles, however many or few shots there may be in each of them, knowledge of any faulty or dangerous construction there may be in the hundreds of millions of them that are made every year. It charges them with the duty of knowing any fault in any one of these millions of candles made every year, and, for that reason, to use an expression in the brief of learned counsel for appellant, the sale of each one of them carries with it a free accident policy to whoever may fire off one of them.

As we have said, there was no contractual relations between plaintiffs, or either of them, and the defendant, and,

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hence, there was no implied warranty of any kind, because there cannot be a warranty where there is no contract; and the only ground upon which plaintiffs can predicate liability against this company, is that it knowingly manufactured an instrument imminently dangerous and placed it upon the market, when it must have known that somebody, other than the one to whom it sold them, would be injured when it fired the candle, by reason of its faulty and dangerous construction; and knowing these facts when it made and marketed these candles, or having good reasons to know these facts, it is liable to whom is injured when firing this imminently dangerous instrumentality. We think the law is well settled that, if the article, when made, is imminently dangerous, and known to be so by the manufacturer, and with such knowledge he then places it upon the market, it does carry with it, in such case, a free accident policy to anyone who may afterwards use it and become injured on account of its imminent danger. We think the weight of authority limits liability to cases where the manufacturer has knowledge, at the time he makes the article, of its imminently dangerous qualities and, knowing this fact, places it upon the market. There possibly might be a case where the manufacturer would be liable when, if it were shown that he could have discovered the dangerous quality of the article by the exercise of reasonable care and diligence, but these cases are few and we think this is not one of them.

We have been puzzled, in considering this case, to know how it would be possible for the makers of Roman candles, by the exercise of the very highest degree of care and caution, to discover, after they are finished, that they were imminently dangerous in the hands of anyone firing them. All of the candles are made by machinery and according to well-settled rules. Their manufacture is under the con-

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trol and direction of experienced and competent men. All of them are made just alike, and of the millions that have been made, this record shows all were made practically and substantially alike, and were prepared for firing in the same way. When completed and ready for use, having gone through with the usual method of making and all looking just alike from the outside, how is it possible for the maker to discover a defect in their construction which exists on the inside of the candle? The end which is held is packed with clay, and over that is folded a part of the covering. At the other end is the fuse protruding from the muzzle, and a colored paper folder over it. Nothing on the outside of the candle indicates any faulty construction. The trouble is always on the inside. In this condition we would be glad to know what reasonable care and caution a manufacturer could exercise to discover any fault or defect in the construction of a candle on the inside that made it imminently dangerous to one who fired it. What kind of a test could be made that would disclose the fault? What reasonable and ordinary test is to be applied in such a case to discover its faulty construction? What burden of reasonable care and caution does the law place upon the maker of the candle in such case, to discover whether it is negligently made or not, so as to make it imminently dangerous? No test has been suggested which the law requires the maker to use in discovering the fault on the inside, and we confess we have been wholly unable to think of any reasonable test, and none has ever been applied, so far as this record discloses, that would determine whether or not the candle has been so negligently constructed as to make it imminently dangerous to the one who fires it.

If it is insisted that such test should be made by the manufacturer before he puts the candles upon the market, it would follow, if he did so, that he would never put one

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on the market, for the reason that in testing them, all would be destroyed. This, it seems to us, shows the absurdity of the insistence that defendants are liable to plaintiffs in this case, if they could have discovered by the exercise of reasonable care and caution, the imminent danger in the construction of this candle, for the only way to discover that fact, after the candle is made, is to fire it off, as is often done on the testing grounds of Binghampton. We do think, however, that if this company, when it made and placed on the market this Roman candle, or others as for that matter, it then knew that it was negligently constructed and imminently dangerous to the one who fired it, it would be liable to anyone who afterwards bought and used one of them and was thereby injured by reason of such faulty construction, of which defendant company had knowledge when it made and marketed them.

The rule in this State is not as contended by learned counsel in his brief. In citing *Burkett v. Manufacturing Co.*, 126 Tenn., 472, learned counsel states the holding of the Supreme Court in that case as follows:

“1. If the manufacturer had knowledge of the defect, or by the exercise of ordinary care ought to have had knowledge of the defect, and put it upon the market in a defective condition, he is liable to any person injured by it.

“2. If the article manufactured is of such a kind as to be imminently dangerous to human life or health, the manufacturer is liable to any person injured by it, no matter whether he knew it was dangerous or not.

“3. When the article is not apparently dangerous, but is known by the manufacturer to be dangerous, or by the exercise of ordinary care ought to have been known by him to be dangerous, and he gives no notice of its dangerous

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qualities when he puts it on the market, the manufacturer is liable to any person injured thereby.”

The above is learned counsel's statement of what the Supreme Court holds in *Burkett v. Manufacturing Co.*, *supra*. What the Court held in that case is best known by stating its actual holding in its own words, and this we do in order that we may see whether it went to the extent claimed by learned counsel. We quote from the opinion:

“The general rule is, that a manufacturer is not liable to a third person, who buys his goods from an intermediate dealer, because of the want of any privity between the parties. The rule is different, however, if the manufacturer had knowledge of the defects, and put it upon the market in that condition. In such case he is guilty of fraud, and is liable to anyone into whose hands the article falls, and who is injured while using it properly. He is also liable to such third person, were the article sold is of such kind as to be imminently dangerous to human health or life; also, when the article, although not apparently dangerous, is known by him to be such, and he gives no notice of its qualities when he puts it upon the market.”

The above is the exact language of the Court in stating the general rule, and the three exceptions to it, in *Burkett v. Manufacturing Company*.

To sustain this holding, Mr. Justice Neil cites the case relied upon by learned counsel for appellant, to wit, *Huset v. Machine Company*, 120 Fed., 865, a very late case, and the notes thereto; *Kuelling v. Manufacturing Co.*, 183 N. Y., 78; *Tomlinson v. Armour & Co.*, 19 L. R. A. (N. S.), 923, and note; *Hasbrauck v. Armour & Co.*, 139 Wis., 357; *Statler v. Manufacturing Co.*, 195 N. Y., 478; *Laudeman v. Russell & Co.*, 46 Ind. App., 32; *Ward v. Pullman Co.*, 138 Ky., 554; *Pullman Co. v. Wark*, 143

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Ky., 727; *Old's Motor Works v. Shaffer*, 145 Ky., —; *Peaslee-Gaulbert Co. v. McMaths, Admrs.*, 148 Ky., 265.

In the closing part of the opinion in *Burkett v. Manufacturing Co.*, *supra*, it is said, "It is clear, under the great weight of authority, that the manufacturer, when the article is not imminently dangerous, can be held liable to a third party only when he knew of the defect, and with this knowledge put the article upon the market. Some of the cases cited *supra* show that the manufacturer's knowledge may be proven by circumstances; but no effort of that kind was made in the present case." (And in the case at bar no effort was made by either direct or circumstantial evidence, to show defendant's knowledge of the defect in the construction of the Roman candle.) "In the absence of the knowledge of the defect, his liability is only to those with whom he has contractual relations. The main reasons assigned for the rule are, that any injury that might occur to a third person could not be within the contemplation of the parties to the contract, and that if suits of the kind were sanctioned against manufacturers, there would be no end to litigation and practically no means in the great majority of the cases for the manufacturers to protect themselves, and therefore, that useful class of producers would be so loaded with litigation that their skill, labor and enterprise would be greatly discouraged, if not destroyed, to the great detriment of the public welfare."

It is thus seen that the Supreme Court, in *Burkett v. Manufacturing Co.*, nowhere, in any part of the opinion, intimated that if the manufacture, "by the exercise of ordinary care ought to have had knowledge of the defects," he would be liable to any person injured. And it nowhere held, in any part of the opinion, that if the article made is not apparently dangerous, but the manufacturer, "By the exercise of ordinary care ought to have known of the

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dangerous condition of the article and gave no notice of this quality but places it upon the market in its dangerous condition, he is liable to any person injured thereby." The Supreme Court made no such holding as that claimed by learned counsel, but in every case placed liability on the manufacturer by reason of his knowledge of the defect in one case and in the other where the article, although not apparently dangerous, was known to the manufacturer to be so, and he gave no notice of that quality when it put the article on the market. The Court does not adopt the rule of constructive knowledge as insisted upon by learned counsel, but confines its holding to the rule of actual knowledge on the part of the manufacturer, even in the case where the article is not apparently dangerous. It is true that the Court says in a part quoted, *supra*, that, "Some of the cases cited show that the manufacturer's knowledge may be proven by circumstances," indicating clearly that it still holds to the rule that knowledge on the part of the manufacturer must be shown.

We have carefully examined every case cited by learned counsel for appellees and appellant, and some cases not cited by either, and with the exception of perhaps two of them, each case brought to our attention has placed liability on the manufacturer alone upon the ground that when he made and put the article upon the market, he, at that time, knew it was imminently dangerous to persons using it. In a few cases we have examined, the article was not apparently dangerous. It looked all right to a person examining it; but the vendor knew it was dangerous and concealed the fact from the purchaser, knowing at the time that others than the vendee would probably use it, and the Court held, in each of those cases, the vendor liable to one not a vendee who had used the article and been thereby injured. In many of the cases examined, knowledge

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of the defective condition of the article and the danger there was in using it and brought home to the manufacturer by circumstantial evidence. It is as competent to prove actual knowledge by circumstantial evidence as it is to prove it by direct and positive testimony.

The quotation from *Huset v. Machine Co.*, 57 C. C. A., 237, contains a statement of one of the exceptions to the general rule against liability where there is no contractual relations, and this exception has reference to an article which is imminently dangerous to the life or health of mankind, that is, to an article that was intended to preserve, destroy or affect human life, and comes under the class of cases known as the drug cases, where it is held that druggists, in the preparation and sale of their medicines, must exercise the highest degree of care so as not to injure anyone by the drugs they manufacture, prepare and sell. It is true, if the manufacturer, in the preparation and sale of his articles makes them dangerous to health and life, and knows this fact or does not know it, he is liable to anyone who uses the drugs after they are placed upon the market by him.

The first case cited by learned counsel, and it is the case on which he seems to base his argument, is that of *Schubert v. Clark*, reported in 15 L. R. A., §18, which is an opinion by the Supreme Court of Minnesota delivered in April, 1892. The first part of the opinion bases liability against the manufacturer upon this ground, as stated by the learned Judge who delivered the opinion: "If knowing the existence of such defect, he neglects to disclose them, so that the other party may be warned of his danger, such neglect amounts to bad faith. Under such circumstances silence would partake of the nature of an assurance that the thing had not any such known but concealed dangerous defects. Silence would have the effect

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and quality of deceit." The learned Justice is here considering in the first part of the opinion, the effect of the maker's knowledge of the defects when the ladder was delivered to the purchaser for use. The ladder in question was made and placed among his stock of goods for sale by the manufacturer sometime before it was sold to the vendee and used by the painter. It appears that the rounds of the ladder were made of "Poor, cross-grained and decayed lumber, and was so insufficient in strength as to be dangerous to the life and limbs of the plaintiff and whoever might use the same." Its purchaser was plaintiff's employer, who did not know of the faulty material used in the rounds, because they had been varnished, oiled and painted so it could not be discovered. When the Court finally comes to pass upon the real question of liability as made in the complaint filed in the lower Court, the learned Judge then says: "The question of the defendant's liability reaches back to the time of the manufacturing and putting into its stock of goods for sale, an article then known to be dangerously defective, the defects being concealed and not likely to be discovered, either by any intermediate purchaser standing between the defendant and the person who might procure the ladder for use, or by the latter person. We shall assume, then, that there was no wrongful conduct when the ladder was delivered, but only, if at all, when it was manufactured and put in the defendant's general stock for sale. . . . When the defendant manufactured and put the dangerously faulty article in its stock for sale, it is to be deemed to have anticipated that, in the ordinary course of trade, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which were actually suffered."

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Liability in that case was placed upon the ground that the manufacturer made and put into his store for sale, an article which he then knew to be dangerously defective, and which defects were concealed and not likely to be discovered, either by the purchaser or by anyone who later used it. This was the ground upon which the Court predicated liability. The actual knowledge of the dangerous defect in an article which he placed in stock for sale and which he later sold. There is nothing said in this opinion about liability against the manufacturer being predicated upon constructive knowledge of the defects in the ladder. The whole opinion goes upon the idea that he is only liable where he had actual knowledge of the defect when he manufactured and put the article in stock for sale. In this view of it, the opinion is in accord with our Tennessee authority.

We have also examined the case of *Statler v. Manufacturing Company*, decided by the Court of Appeals of New York and cited by the Supreme Court in *Burkett v. Manufacturing Company*, *supra*. The article involved in that case was held by the Court to be an inherently dangerous appliance. The Court said, after treating of one branch of the case, "This leaves, on this branch of the case, simply the question whether the manufacturer and vendor of such an inherently dangerous appliance as this, was liable to a third party on the theory invoked by plaintiff, and we think that this question must be regarded as settled in the latter's favor by the following authorities." The Court in that case, was treating of an inherently dangerous appliance, while in this case we have simply a Roman candle.

But, we are not dealing, in this case, with an article inherently dangerous, for learned counsel himself concedes that this Roman candle is not imminently dangerous un-

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less it is defectively constructed; or in other words, it is not in its nature inherently dangerous, and before it can become imminently dangerous, according to a statement in his brief, it must be defectively constructed. Of course, it might be so negligently made as to become imminently dangerous, but it never was, in the ordinary and usual way it was made, inherently dangerous. We do not think this case is any authority for the position of learned counsel.

The next case to which we are cited is the case of *Old's Motor Works Company v. Schaffer*, *supra*, decided by the Court of Appeals of Kentucky. In that case the manufacturer placed on the rear of the automobile what is called a rumble seat. They put it there so insecurely as to be likely to break off if a passenger attempted to ride on it. The following is a quotation from the opinion in that case:

"There is *convincing evidence* that the box upon which the rear seat rested was not only insufficient in itself, but was insecurely fastened to the body or bed of the automobile. It is clearly shown that the body of this box was made out of wood entirely too thin and light for the purpose, and that it was held in place on the body of the machine that ran up on the inside of the box and to which the box was fastened by very small and short wood screws. The evidence is conclusive that the box should have been fastened to the iron upright by bolts, and that the manner in which it was fastened was unsafe and dangerous in the extreme to persons riding on the rear seat."

This excerpt from the opinion of the Court of Appeals of Kentucky shows that the proof heard in the trial of the case made it clear that the rumble seat was so defectively constructed that the manufacturer of it was bound to know at the time and before placing it upon the market, that

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it was dangerous. It showed knowledge of defective construction on the part of the makers, and instead of supporting the contention of learned counsel for Mr. Wilson, it is clearly in line with the doctrine of the Supreme Court of this State as laid down in *Burkett v. Manufacturing Company*.

We come next to the case of *Pullman Company v. Ward*, 137 S. W., 234. The quotation from the opinion of the Court of Appeals of Kentucky, in this case, as we find it in brief of learned counsel, shows that the Pullman Company manufactured and delivered to the railroad company a car with a brake rod constructed in an imminently dangerous manner, which it knew at the time was so constructed, and concealed the defect with paint. The Court held this was a fraud which rendered it liable to one properly using the brake rod and having no contractual relations with the defendant company. The effect of what the company did, the Court of Appeals said, was to commit a wrong and fraud by constructing such a brake rod and then concealing the defect in such manner that one using it was unable to discover it. Liability in this case was placed upon the ground that the Pullman Company knew that the brake rod was so constructed as to be imminently dangerous; that it concealed the defect with paint and then sold it to the railroad company, knowing the use to which it would be put, and that probably a brakeman working for the latter company would, in using it, be placed in an imminently dangerous position by reason of the defective brake, and probably lose his life or suffer great physical injury. This case is in line with *Burkett v. Manufacturing Co.*, and nowhere intimates that liability might be predicated on constructive knowledge.

Gherkin v. Brown, 143 N. W., 48, is cited in the brief of learned counsel. We do not have access to this case,

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but it is stated in the brief, "It was held that a wholesale dealer who placed upon the market dyed fur coats, with knowledge that they were injurious to a few persons, without giving warning of this danger, is liable to one who purchases a coat for the injuries caused from wearing it." This is a case clearly placing liability on the wholesale dealer for his knowledge that the coats would injure any person who wore them. It is not stated by counsel in his brief that the Court held that if the dealer had constructive knowledge of the injurious effects of wearing the coats, it would be liable.

We will not attempt here to distinguish the case of *Cunningham v. House Furnishing Company*, reported in 20 L. R. A. (N. S.), 237, being an opinion delivered by the Supreme Court of New Hampshire, except to say that, in our judgment, this case come squarely within that class of cases where high explosives are involved, and within the rule of liability laid down in drug and explosive cases.

The case of *Pizzo v. Wieman*, reported in 38 L. R. A. (N. S.), 678, is where liability against a wholesale dealer was predicated on his outrageous violations of the criminal law in the sale of a toy pistol, and we do not think the opinion in this case throws any light upon, or has any application to the facts of this case.

The case of *O'Brien v. Bridge Co.*, an opinion by the Supreme Court of Minnesota, reported in 32 L. R. A. (N. S.), 981, is where the defendant built a bridge across a river for the county. The facts, as recited in the opinion of the Court, show that the foundation, as well as most all of the other work in the bridge, was so negligently and carelessly constructed, and left in such dangerous condition, that the Bridge Company must and did have actual knowledge of how they built it and the material in it. A traveler was passing over the bridge when it collapsed, in-

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jurying him. He brought suit against the Bridge Company and was awarded a verdict by the jury of \$11,000. This opinion indicates, that the facts proven in the lower Court upon the trial of the case, showed conclusively that the bridge builders knew of its defective and dangerous construction by them, and, knowing these facts, turned the bridge over to the county for use by the public. This is an exceedingly interesting and very able and exhaustive opinion by Mr. Justice Jaggard, wherein was reviewed nearly all of the authorities in the United States. Further, on examination of all the authorities cited in *O'Brien v. Bridge Co.*, *supra*, the opinion clearly indicates that the learned Justice who decided the case placed liability upon the grounds of knowledge of the dangerous defect, and not upon constructive knowledge, and that he understood all of the authorities cited by him in his learned and lengthy opinion, to so hold. In closing the opinion the learned Judge says, "Defendant's knowledge of the danger created by its negligence in the construction of the foundation is clear. It selected and combined the material. How it could have avoided knowing the character of the underlying soil of the imperfect material used, and of the improper method employed in the construction of the foundation, or the foundation and piers, does not appear. . . . That dangerous condition was concealed so far as the foundation was concerned, by the waters above it; so far as the rottenness of the cement in the piers, by the iron castings, if the piers be regarded as involved. . . . The resulting instrumentality was not only extremely and imminently baneful, but was almost essentially lethal. If the bridge should fall while or because it was being used, death would be probable and damage certain." All of which the learned Judge says the Bridge Company knew when it constructed and delivered it to the county for use.

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The next case cited is that of *Lewis v. Terry*, decided by the Supreme Court of California and reported in 31 L. R. A. (O. S.), 220. It appears from the opinion in this case that the defendant sold a folding bed to a Mr. Apperson and his wife, and expressly represented and warranted that such a bed was so constructed that it would stand upright against the wall during the day time, inclosing necessary bed clothing, and at night its front could, with little effort, be lowered in a horizontal position by means of hinges in the bottom. The Supreme Court of California, held in that case, that while there was no contractual relations between the defendant and plaintiff, the defendant having sold the folding bed, represented it to be safe for use, when he knew it would be dangerous to use it, was liable for injuries caused by the defects, to any person who used it, although there was no privity of contract between them. This case is in accord with the opinion of our Supreme Court, where it makes liability depend upon actual and not constructive knowledge of the dangerous defects in the article sold.

The case of *Pittsburg Manufacturing Company v. Pittsfield Shoe Company*, decided by the Supreme Court of New Hampshire and reported in 60 L. R. A. (O. S.), 117, while quite an interesting case upon the point involved in the suit, in our opinion, has no application to the question considered here.

The next case is that of *Woodward v. Miller*, 64 L. R. A. (O. S.), 934. The gist of the opinion in this case is found in its syllabus, and we need not quote more of the opinion than that to show that it is in line with our own Supreme Court. It is as follows:

"The manufacturer of a buggy who sold it to a municipal corporation for the use of one of its employes, representing it to be strong and in good condition, but *knowing*

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that it was in fact defective, the defect being so concealed by the use of paint and grease that the purchaser cannot detect it, is liable in damages to the person whose use of the buggy was contemplated at the time of the sale, for injuries caused by such defects; and this is so, notwithstanding there was no privity of contract between the plaintiff and the defendant in the sale of the buggy."

This case was based upon the actual knowledge of the vendor, and no reference was made in the opinion to his constructive knowledge of the defects in the buggy.

We have now reviewed, as we believe, all of the cases cited by learned counsel for Mr. Wilson to sustain his argument that constructive knowledge is all that is necessary in order to predicate liability; and we have found that none of the cases support his insistence. A careful and discriminating reading and consideration of all of these cases clearly indicates that they are in line with the rule announced by our own Supreme Court in the case of *Burkett v. Manufacturing Company*. It would be difficult for us to believe that the rule of constructive knowledge should apply, or ought to apply, in a case where the construction of, or defects in a Roman candle is involved. There might be some reason for the application of such a doctrine to the case of an automobile, where proper tests applied to any of its parts would determine and detect any fault in its construction; but how any test could be applied in the case of a Roman candle in order to detect defective construction within its case, is a question we have been unable to determine. The manufacturer makes them according to and by the standard rules employed by all well-regulated and standard manufacturers of fireworks, and when he does this, in our judgment, he has discharged all the duty imposed upon him by the law. The law does not place upon him the burden, and it would be a burden, of

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requiring him to test, in some way or other, every candle in order to see that it is not dangerously constructed before it leaves his factory. As said by learned counsel for the Fireworks Company, the law does not charge it with knowing what cannot be known and what no one else has ever been able to know after a patient and diligent investigation and tests, and what the jury after hearing all the proof and seeing the many tests and experiments in their presence, were unable to say was the cause of the candle back-firing.

Returning to the case under consideration, we are of the opinion that there was no legal obligation upon this company to make an inspection of its millions of Roman candles that it every year manufactured and put upon the market. As we have said, we know of no way by which such an inspection could be made that would discover defects on the inside of the case of a Roman candle after it is completed. That being true, the only way it can be made liable for negligent construction of its fireworks, is to show that, while making them they were defectively and dangerously constructed, and with the knowledge of that fact, they placed them upon the market to be used, without notice to the consumer of their imminently dangerous condition, and in such case, the law will hold them to a strict accountability to every one injured thereby.

We have not thought it necessary to consider the other errors assigned by learned counsel for appellant in his brief. This one is determinative of the case before us.

It results that the judgment of the lower Court is reversed and plaintiff's suits dismissed with costs.

HIGGINS, Judge, dissenting:

I feel constrained to dissent from the views of the majority. I am of the opinion that the Cir-

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cuit Judge was right in submitting the question of negligence to the jury. It seems to me that there is too much of a tendency to exalt the lack of privity feature. This is the consequence of an adherence to a long line of precedents having an economic instead of a humanitarian aspect. Again, we are persuaded that a broadening social conscience and a real look into the nature of transactions will bring to light and supply this missing link in actions by injured persons against manufacturers of articles intended for immediate use by purchasers from retailers. Prospectively and intentionally the maker constructs his article for the benefit or enjoyment of someone of the vast concourse of purchasers who may be prompted by a desire to possess it. It is not unreasonable to assert that the manufacturer thus assumes a relationship with his consumer, and that the middle man is simply used as his agent for making the sale and delivery. We uniformly hold that an innocent retailer is not responsible to an injured customer when the retailer defends upon the ground that he bought his goods from a reputable manufacturer. If we now deny the party who has suffered from someone's fault a recovery against the manufacturer also, we leave him remediless. This lack of privity originated ages ago when all sales were virtually direct, and it was applied mostly in cases of express and direct sale; sales were face to face. It was not then contemplated that there would be set apart certain men to manufacture vast quantities of small things to be sold out to numberless retailers and again vended by them to users. Hence, a reason for not adhering too closely to this doctrine. Legal concepts should undergo some change as societies change. We do not see why the manufacturer who would be held liable to an immediate purchaser for defective construction may not also be held liable to a remote vendee into

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whose possession the manufacturer intended that his defectively constructed article should pass. Assurance of safety, or representation of trustworthiness, or implied stipulation of soundness, or of the possession of skill, are features not unknown in the law of torts. The physician and the lawyer hold themselves out as possessing skill; so does the carpenter or manufacturer of plows sold to users; and numerous other doers of things assure the world that care has been exerted and that the act and the product are reasonably usable and safe. Why not let a jury determine whether this implied representation of assurance is true, and if not whether there was negligence in original construction or performance?

The argument made that this would be ruinous to manufacturers is not sound. It must not be assumed that witnesses are going to prevaricate, nor that juries are going to act perversely, nor that Courts are going to sanction the visitation of damages upon parties not at fault. Instead of endangering society, the contrary doctrine to that urged by the majority might be better in the long run, especially when applied to manufacturers of fireworks who know that their articles are going to be handled by infants. Absolute responsibility for accidents occasioned by the exercise of a great social or economic privilege is not unknown to the common law. Nor is it strange to say that one of the conditions of certain employments is that their followers must exercise extreme care to the end that parties be not injured. I am not contending that the rules thus stated should be adopted here, but I do not believe that the makers of firecrackers should be treated as liberally as the makers of wagons and buggies, etc. I simply refer to these considerations as furnishing juristic basis for the contention that the jury should be permitted to determine from the occurrence whether the manufacturer was in any sense blame-

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worthy. We are dealing with a case of original construction and not of negligent handling. In the former cases any act of negligence resulting in a defective product is the act of the maker. If it imperiled human life there was a negligent act or a mistake the doer or permitter of which should be charged with the consequences. I am unable to see how this Court can as a matter of law and absolute certainty say that the manufacturer was free from negligence or from blame.

The foregoing remarks may appear to be unsound and inapplicable to the present age or to present conditions. But there will be a recurrence of such questions as are here dealt with, and it is for this reason that I wish to enter a mild protest against the concentered rule that a wholesaler or manufacturer cannot be held liable to a remote vendee where the latter has suffered grievous wrongs because of errors probably traceable to the manufacturer or wholesaler. The weighing of probabilities in such cases should be left with the jury.

Power Co. v. Cleage.

EASTERN TENNESSEE POWER CO. v. R. V. CLEAGE, ET AL.

Affirmed by the Supreme Court.

(*Knoxville*. September Term, 1914.)

1. EMINENT DOMAIN. *Practice in proceedings to condemn lands. Petitioner to first introduce all his evidence in chief.*

Although a proceeding in which lands are sought to be condemned under the power of eminent domain is dual in its objects and results, the one party seeking to take the lands and the other seeking compensation therefor, still the party seeking to take should first introduce all his evidence in chief, that bearing on the measure of compensation as well as that on the right to take, and the other party then introduce all his evidence on those questions, as any other practice would cause confusion.

2. SAME. *Same. Discretion of court.*

Where the trial Court has followed the practice announced in the preceding head-note and refused to permit the party seeking to condemn to bring forward its evidence as to compensation only after the parties seeking compensation have brought forward their evidence on that question, there can be no reversal where no reason was given why such evidence was not at first brought forward, the matter being largely in the discretion of the trial Court and no abuse of that discretion being shown.

FROM McMINN COUNTY.

Appeal from the Circuit Court of McMinn County.
SAM BROWN, Judge.

EUGENE IVINS for Plaintiff in Error.

Power Co. v. Cleage.

CLEM J. JONES and R. A. DAVIS for Defendant in Error.

MR. JUSTICE HUGHES delivered the following opinion which was affirmed by the Supreme Court:

EASTERN TENNESSEE POWER COMPANY, a corporation engaged in manufacturing and transmitting electricity, and having the power to exercise the right of eminent domain for the purpose of condemning rights of way through lands between its developing plants and reservoirs and the cities and towns to which it might have occasion to transmit electricity, brought this suit by petition duly filed for the purpose of condemning a right of way through a certain tract of land in McMinn County belonging to defendants, the lands sought to be condemned being a strip one hundred feet wide and of such length as that it contains four and thirty-six one-hundredths acres. From the report of the jury of view condemning the strip of land and fixing its value at \$1,000 and incidental damages at \$200, the Power Company appealed to the Circuit Court, and from the judgment of that Court fixing the value of the strip at \$997.10 and placing incidental damages at \$200, it appealed to this Court, and has here made one assignment of error based on the action of the trial Court in its rulings on the order in which evidence should be offered.

When the case was taken up for trial in the Circuit Court, and after the petition with an amendment had been read to the jury, the parties litigant, evidently to obviate the necessity of formal proof thereof, stipulated and agreed that the petitioner was a corporation vested with the power of eminent domain for the condemnation of rights of way; that the strip sought to be condemned was necessary for its corporate purposes; that the attempted condemnation in the case was a proper exercise of that power;

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that the strip sought was 1,898 feet long by 100 feet wide, and contains four and thirty-six hundredths acres, and was properly described in the petition. These facts being agreed to petitioner rested, whereupon the defendants moved the Court to affirm the verdict of the jury of view on the ground that petitioner had offered no evidence on the question of value of the strip and damages. The Court overruled this motion on the ground that the case was there for trial *de novo*. Defendants then introduced evidence as to the value of the strip of land, and incidental damages. By the witnesses thus offered it was shown that the lands lie in about one hundred yards of the court house at Athens, the county seat of McMinn County; that they were suitable for building purposes, and had previously to the bringing of the condemnation proceedings, been laid off into town or city lots with a view of putting the lots on the market, but that, notwithstanding this value, they had been used for agricultural purposes. These witnesses offered by defendants estimated the value of the strip taken at all the way from \$2,500 for the strip to \$150 per acre, or \$654 for the strip, and estimated the incidental damages at all the way from \$500 to \$200. When defendants closed their testimony petitioner introduced a witness whom it proposed to examine on the question of the value of the land and incidental damages, but defendants objected to this testimony being then offered by petitioner, insisting that such would have been proper as evidence in chief only, and was not proper in rebuttal, and that therefore it was incumbent on defendant to have introduced it in chief rather than in rebuttal. The record before us shows that after the question had been argued to the Court and considered by it the objection was sustained and the witness was not permitted to testify on the questions of value and damages. Petitioner objected to this ruling of the Court

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and offered three other witnesses whom it proposed to examine on the same question, but the Court adhered to its ruling, and the testimony of these witnesses was not permitted to go to the jury, though they were examined and cross-examined before the Judge in the absence of the jury and their testimony preserved in the bill of exceptions. These witnesses offered by petitioner estimated the value of the strip sought to be condemned at from \$500 to \$365; and all of them except one testifying that there would be no incidental damages, the one witness fixing such incidental damages at \$100.

The matter complained of here is that the trial Court committed error in not permitting the petitioner to examine the witnesses introduced by it as to value and damages before the jury; and the question which was argued chiefly at the bar of this Court, and which is pressed in the briefs of counsel, is whether or not the defendants had on them the burden of proving the value of the strip sought to be condemned and the damages incident to such condemnation; it being insisted by attorney for petitioner that if defendants had such burden the proper practice was to require them to introduce their witnesses first in chief on that question and then permit petitioner to introduce its witnesses, while counsel for defendants insist that the burden of proof was on the petitioner and that therefore the correct practice required it to first introduce its evidence on those questions and then permit defendants to introduce its evidence relative thereto. By counsel for defendants it is said that petitioner was the complainant in the suit for all purposes and should have introduced all of its pertinent proof in chief, that on the question of value and damages as well as that on its right to condemn.

Counsel for petitioner cites and relies chiefly on the cases of *Alloway v. Nashville*, 4 Pickle, 510; and *Tenn. Central*

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Railroad Co. v. Campbell, 1 Cates, 640, wherein, and especially in the *Campbell* case, it is pointed out that the condemnation proceeding is of a dual nature, the plaintiff recovering the land sought to be appropriated and defendant the value of the land taken and damages accruing to the remainder, or that not taken; and it cannot be questioned that the burden of proof is on the parties respectively as pointed out in these cases. It appears, however, that this matter of burden of proof does not necessarily control as to who shall first introduce evidence. It frequently happens that on certain issues in a litigation the party plaintiff or complainant may have the burden of proof, while in the same suit the party defendant may on other issues have the burden. Still, as is well known, this does not mean that the party plaintiff or complainant must first introduce only that evidence bearing on the issue or issues on which he has the burden of proof, and that the party defendant must then introduce his evidence on such question or questions only, and that after the parties have thus brought out their evidence bearing on part of the issues involved the party defendant must introduce his evidence on that issue or those issues where he has the burden of proof, and the party plaintiff or complainant follow with its proof on such question or questions. If such were the practice it would result in much confusion. Such a rule would require a hearing on different questions or issues in the same suit, just as if they formed separate and distinct suits, and would thus give the effect of having a trial within a trial, and necessarily producing much confusion. The simpler course certainly is that usually followed, which requires plaintiff or complainant to introduce all his evidence in chief on all the issues involved which depend on the evidence for their solution, and defendant to then follow with all his evidence on such issue; and we see no reason why

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such course should not be pursued in condemnation proceedings although on some question the petitioner has the burden of proof and on others the defendant has the burden. We think that such practice as the trial Court required in the instant case was proper, especially when the attitude of the case in the trial Court is considered. The case had been appealed to the trial Court on *all issues*, and it there stood for trial both as to the right to condemn the lands, and as to the value of the lands taken and damages to such as were not taken. This was recognized by the parties when the trial was gone into, and when, by the agreement in lieu of evidence, the necessity of the petitioner's proving its right to condemn was dispensed with, as was unquestionably done. When this agreement was made, *after the jury had been impanelled and the petition read*, petitioner rested, having made out its case, thus showing that the parties recognized the agreement as simply supplying the place evidence. We do not mean to hold or intimate what the proper practice would be in a case where the question of the right of condemnation has been eliminated, and the only question before the Court is the matter of value and damages, a situation that might arise, as is pointed out in the case of *Cunningham v. Terminal Co.*, 18 Cates, 343. Such is not the case here, but this is a case where the questions were before the Circuit Court both as to the right of petitioner to condemn and the right of defendants to value and damages; and in the judgment of that Court the rights of the parties on both these questions were fixed.

Another matter of consideration which lends aid to the view that the petitioner should offer all of its pertinent evidence as evidence in chief when first introducing its testimony, is that under the holding in the Alloway case petitioner had the opening and closing of the argument

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before the jury on all questions. 4 Pickle, 526. I would be anomilous and confusing to require the petitioner to introduce in chief only its evidence on the right to condemn and then in rebuttal its evidence on the question of value, and yet say it shall open and close the argument on all questions. Such practice would simply intensify the confusion that would result from such course of introducing evidence as is contended for by counsel for petitioner. For these reasons we believe the trial Court acted on the proper principle when holding that petitioner should have introduced all of its evidence in chief before defendants were required to introduce any of their evidence.

Still the question of practice here involved not having been expressly passed on by the Appellate Courts in Tennessee, it might be said that the procedure required by the trial Court worked harshly in that it permitted defendants to get their evidence as to value and damages before the jury, and that, too, under a practice not settled, so that petitioner might properly have conceived that it would be permitted to introduce its evidence as to value and damages in rebuttal, and that therefore though the proper practice might be as herein announced, still the trial Court in his discretion should have permitted petitioner to introduce its evidence as to value and damages after defendants had introduced theirs on those questions. Such a suggestion, while it carries weight, is not, as we think, controlling. In *Smith v. Britton*, 4 Hump., 201, the trial Court refused to permit any rebuttal evidence in corroboration of plaintiff's witness in chief where defendant had attacked such witness' character after his testimony in chief had been given. After holding that such corroborating testimony was itself testimony in chief, and in speaking of the rule requiring plaintiff in his opening to introduce all of his evidence going to establish his rights of action, and after

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observing that permission to violate such rule should not be granted "except for good and sufficient reasons shown," it was said:

"The relaxing of the rule, then, is a matter of discretion with the Court; and so difficult is it to reverse for the exercise of a discretion that many Courts have refused to do so; but in this State it has been held that the wrong exercise of a legal discretion is a matter of error; but then it must be gross and palpable, and not subject to hesitation or doubt."

This holding in *Smith v. Britton* was expressly approved in the later case of *Railroad v. Hunton*, 6 Cates, 623, the exact language of the earlier case being quoted in the latter.

Applying the rule of the *Smith-Britton* case to the facts of the case at bar it can be said that no "good and sufficient reason" was shown or was offered in the Court below for a relaxation of the rule applied and enforced by the trial Court, and there is no showing that the discretion exercised by the trial Court was "gross and palpable," and it cannot be said to be free from "hesitation or doubt," the fact being that no reason appears to have been given in the trial for petitioner's not offering all of its evidence in its opening. It is not pretended by it or in its behalf that it was misguided by any preconceived idea of the proper practice.

For the reasons indicated, we are of opinion there is no reversible error in the matter complained of, and the judgment of the lower Court should be affirmed.

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HIGGINS, Judge, dissenting:

I cannot yield my assent to the proposition that it is the duty of the condemnor in a condemnation proceeding to introduce evidence in the first instance as to damages where the right to condemn is undisputed. I think the more logical and consistent view is to treat the landowner as the plaintiff, or at least to let him assume that attitude. He certainly stands as an affirmant. He asserts that his land is of certain value. The taker denies this and seeks to reduce it. The owner insists that he has been incidentally damaged. The taker disputes this or urges incidental benefits by way of set-off, which is purely defensive. Again, it has been decided time and again in this State that there are two lawsuits involved in a condemnation case. In one of these the landowner must be treated as plaintiff, and I am unable to see how he can be treated as defendant without there be retraction of what has been many times announced: *Cunningham v. Terminal Co.*, 18 Cates, 343.

VANCE HALE V. ROGERSVILLE ELECTRIC COMPANY.

Writ of certiorari denied by the Supreme Court.

(*Knoxville*. September Term, 1915.)

1. PUBLIC SERVICE CORPORATION. *Duties between citizens and, reciprocal.*

The duties which a public service corporation—one organized to serve the public, and the duties which the citizens owe to it are so far reciprocal that any rule, or regulation, or course of dealing between them which does not secure the just rights of both ought not to be adopted, and cannot receive the sanction of the Courts.

2. SAME. ELECTRIC COMPANY. *One not taking its current for regular use not a patron or customer.*

One not taking or offering to take for regular use, but seeking to take or tie up for use only in emergencies, the current of an electric company, organized and existing as a public service corporation, is not a customer or user who can make demands on the corporation as to furnishing him current.

3. SAME. SAME. *Citizen cannot make inequitable demand of.*

A citizen interested in one electric company, and using its current primarily to supply his purposes, cannot demand of a rival company that it tie up and hold, for emergencies only, its current at a minimum rate, when to do so would be to deprive other citizens of it, and at a sacrifice to the company itself.

4. SAME. SAME. *May put in different classes patrons or customers whose uses and demands differ.*

A corporation of the character indicated in preceding headnotes may put those customers who take current for emergencies only in different classes from those who take for regular use, and charge them a higher rate.

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5. SAME. SAME. *Rates regulated by circumstances.*

A different rate may be charged for electric current as circumstances differ, such as the amount of current used, number of lights, time furnished, distance from main or feed line, etc.

FROM HAWKINS COUNTY.

Appeal from the Chancery Court of Hawkins County.
HUGH G. KYLE, Chancellor.

CHESTNUT & PORTRUM for Complainant.

BOWEN & THOMPSON for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

COMPLAINANT, Vance Hale, is the proprietor of a moving picture show in Rogersville, Tennessee, and the defendant, Rogersville Electric Company, is a public service corporation engaged in furnishing electricity to the people and industries of Rogersville; and the original bill in this cause alleges that defendant, in the matter of furnishing complainant's picture show with electricity for power and lighting purposes, was guilty of improper and illegal discrimination in refusing to furnish the electric current at a rate at which it should be furnished, and seeks to enjoin and prevent the discrimination. The Chancellor granted the relief sought, and defendant appealed to this Court, and has here assigned errors.

The original bill was filed December, 1913. Something less than a year before that time complainant became the proprietor of the picture show. The town of Rogersville was then supplied with electricity for lighting and power

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purposes by the defendant only, it being at that time the only electric company operating there. Complainant had been, preceding the time he embarked in the moving picture enterprise, and was then, in the employ of defendant as its electrician. Because of the relations existing between complainant and defendant, defendant began furnishing complainant the electric current for use in connection with his picture show at a less rate than it was furnishing to other people or users. Its uniform rate to users of the electric current for lighting purposes at the time complainant began operating his picture show was seven cents per kilowatt hour with a minimum charge of \$1.00 per month, and still cheaper rates per kilowatt hour with a higher minimum to users for power purposes was being charged. Complainant used, in connection with his his picture show, from three and one-half to five horsepower of the electric current while the show was in operation, some of which was used for power purposes and some for lighting purposes. Although complainant was then given a minimum rate of \$1.00 per month, he used, according to his own estimate, \$16.00 to \$18.00 worth of current per month, even at the low rate at which it was furnished to him, but as the amount used by him is estimated by another he used perhaps more than that, and what would have amounted to about \$24.00 per month had he been charged the usual rates to users who took the electric current for lighting purposes. After complainant had been using the current in connection with his picture show for some months, he organized another and separate corporation for the purpose of manufacturing and selling electricity. When that new electric company was organized and put in operation complainant became its manager and president and chief stockholder, and began using chiefly the current produced by his own company to furnish the lights and power necessary to run his

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picture show. When he first began furnishing by his own electric plant the current for his picture show his plant was not in position to furnish all the current he needed, but he used it for the purpose of furnishing the current insofar as it could do so, and soon his plant got to the point where it could furnish all the electric current necessary for his purposes. Still, it appears, there were occasions when his own electric plant would, for various reasons, have to shut down temporarily, or, in any event, cease to furnish current, and in order to guard against the contingency of having to stop his picture show on such occasions, complainant desired to remain a patron of defendant for the purpose of using its power when such emergency should arise, and did so retain it for some months. After complainant's own electric plant became thoroughly established he severed his connection with the defendant company as its electrician, and was no longer in its employ. The relation of employer and employe between complainant and defendant having thus ceased, and complainant continuing to use primarily the current from his own electric plant for the purpose of supplying his picture show, and therefore paying to defendant a very small amount for its electric current, defendant changed or sought to change the rate at which it had been previously furnishing complainant the electric current, and established a new rate with a minimum charge of \$15.00 per month. Matters ran along for something like two months under this effort to put in force the changed rate, when complainant refused to pay the minimum charge of \$15.00 per month, and thereupon defendant refused to furnish the electric current on any other basis. This suit resulted, the object of the suit being to require defendant, by injunction, to furnish to complainant, or rather to hold in readiness for him, sufficient electric current to run his picture show at

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the minimum rate of \$1.00 per month; and, as already stated, the Chancellor granted the relief sought.

The undisputed evidence is that electric currents are usually furnished to moving picture shows at the same rate at which they are furnished for illuminating purposes and not at the rate at which they are furnished to power users. But it is shown that the demands made by complainant, which he seeks to enforce by this suit, if complied with, mean simply that defendant would be holding in readiness for him a sufficient electric current to run his entire picture show, which would be worth from \$25.00 to \$35.00 per month, and yet, because of the situation of the parties, complainant would be paying only or very little more than \$1.00 per month as the consideration therefor. This results because, with complainant using primarily the current furnished by his own plant, and using the current furnished by defendant only on occasions when, for any reason his plant could not furnish it, the amount of defendant's current used would not exceed the minimum. The evidence is that for the month of September, 1913, when as it appears complainant's own company was not able to furnish all the current needed, he used only \$4.75 worth of current furnished by the defendant; but from October 1st to November 19th, or more than a month and one-half, he used only twenty-five cents worth of defendant's current, and from November 19th to December 30th, almost a month and one-half, he used only \$1.60 worth, and for the month of January following he used only ten cents worth, and for the next month thereafter he used none whatever. Yet for all this period of seven months, according to the testimony, he had required defendant to produce, but tied up and prevented it from selling to others, current that would have been worth to it from \$25.00 to \$35.00 per month, or in the

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aggregate from \$175.00 to \$245.00. This situation when analyzed means that for seven months from September 1, 1913, to April 1, 1914, complainant, although he had deprived defendant of the use of almost or more than \$200.00 worth of electric current, or had required it to develop and keep that much in stock for him, had paid it only \$12.05, even counting the minimum of \$1.00 per month for the months that less than the minimum had been used; and yet during that time complainant had been an actual and *bona fide* customer of his own electric plant. Still he insists that because defendant is a public service corporation, having imposed on it obligations to furnish to all alike its current at fixed rates, and because his use comes under the classification of light users, he is entitled to the right to prevent defendant from selling its current to other users, or if it had no demand therefor, still requiring it to manufacture and keep on hands for complainant's use the full supply necessary to run his business. Such an insistence does not impress this Court as being equitable; in fact, it cannot be equitable; and the inquiry is, does the law require defendant to manufacture and hold in readiness for complainant such current as he is liable at any time to need, or which he, whether needing it for actual use or not, has the right to call for and use only when it suits his convenience or whims. We are of opinion the law makes no such requirements, and that complainant is not entitled to the relief he seeks.

In the first place public service corporations are organized, permitted to exist and conduct their enterprises for the purpose of actually serving the public, and if complainant were a patron of it, taking and using its electric current, his position would be much more equitable, and he would be entitled to more consideration than under the circumstances presented. In fact, if he were actually a

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bona fide user of defendant's electric current, the minimum rate of \$1.00 per month would be meaningless to him, because, according to all the evidence he would use each month vastly more than such minimum; and for the same reason the fact referred to in the evidence and brief on behalf of complainant that some of the patrons of defendants who use its current for lighting purposes, use as much as \$14.00 worth per month, signifies nothing. This is true for the very reason that where a *bona fide* light user takes every month and pays for more of the current than the minimum rate would be he is paying, not the minimum, but for what he gets. Whether the minimum rate is \$1.00 or less means nothing to him; but such is not the situation with complainant. He desires to require defendant to manufacture and hold in reserve for him electricity worth more than \$25.00 per month, and yet pay for the use thereof perhaps never more than \$1.00, so that the minimum rate becomes a large factor for him, viewing the situation from his standpoint. Not only this; at the same time his scheme would be requiring defendant to manufacture and hold in reserve for him electricity worth more than \$25.00 per month, and requiring him to pay therefor only \$1.00, he would be the actual *bona fide* user of the electric current of another corporation; all of which means that while he would be building up and supporting his own corporation, he would be making demands on his rival, which, if granted and indulged in by many, would simply spell bankruptcy for the rival, it being undisputed that it would cost defendant even more than \$15.00 per month to treat complainant as a patron or user of its current and manufacture and hold in readiness for him the current he requires in his business; yet \$15.00 per month is the minimum at which defendant offers to comply with complainant's demands, it will be remembered. Suppose

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complainant were not the only one making such demand as this, but that others interested in complainant's electric company and using primarily its current should make the same demands, it would simply mean, if the number making such demands were sufficient, that defendant would have to go out of business; and yet such corporations are organized and maintained, and given the powers they possess, in order that they may serve the public, not that they may be put out of business by such inequitable demands. Neither justice nor law sanctions such course as complainant desires to pursue.

In *Indiana Natural & Illuminating Gas Co. v. State, ex rel.*, 158 Ind., 516; 57 L. R. A., 761, a customer of a gas company complained of unjust discrimination in the matter of furnishing him gas, the discrimination charged consisting, as in the case at bar, in charging the complaining party with gas for lights at a rate higher than was being charged to other users coming under the same class. And it appeared in that case that there was actual discrimination of the character complained of, but it was held that before a discrimination could become unlawful such as to authorize the Courts to grant relief against it, it must be unjust and oppressive. To the same effect is the case of *Boerth v. Detroit City Gas Co.*, 152 Mich., 654, 18 L. R. A. (N. S.), 1197; and see 3 Thompson on Corporations (3d Ed.), section 2984.

Still another reason why complainant is not in position to make demands as a customer or user of the electric current furnished by defendant, is that he is not in fact and does not offer to become a *bona fide* user of the electric current furnished by defendant, but, as already herein explained, is simply using or attempting to use his position to take an advantage of defendant that would not only injure defendant but injure the public which is to be

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served. Public service corporations are required to serve only *bona fide* patrons or customers.

The case of *Fleming v. Montgomery Light Co.*, 100 Ala., 657, is in point here. In that case suit was brought to enjoin a public service corporation engaged in furnishing gas for lighting purposes from removing its gas meter from the premises of complainant and from refusing to furnish gas to him. In the opinion it is said: "Stript of the statement of facts necessary to present the complainant's case in an intelligible form, the one question raised is, whether the assumption to supply the inhabitants of the city of Montgomery with gas, imposes the legal duty on the company to furnish gas meters and keep on hand a sufficient quantity of gas for inhabitants who do not use or consume gas, but who desire to be supplied 'with meters and connections with the defendant's gas pipes so that in case an accident which is apt to occur, should happen they could use the gas;'" and in answer to the question thus raised, it is further said, "at one time complainant used gas for lights, but at the time of the filing of the bill, and previous thereto, complainant used in his building electric lights furnished by a different company, or corporation, and was not a patron of defendant company, and the injunction was to make provision 'to use gas' in case an accident should happen to the electric lights in use by orator.

"Plaintiff's contention is, that although he has made other arrangements with a different company for light, yet it is the duty of respondent to keep on hand gas and electricity with proper meters and connections and electric burners 'in case of an accident' to the company which has contracted to supply him, and that, too, without any corresponding obligation on his part to use the gas of the defendant. We can find no such provision in the contract

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between the city and respondent; expressed or implied. There is no equality or equity in such a proposition;" and the relief sought was denied.

The case of *Fleming v. Montgomery Light Co.* is cited with approval by the Supreme Court of Alabama in the later case, decided in 1910, of *Montgomery Light & Power Co. v. Watts*, 26 L. R. A. (N. S.), 1109.

As said in *Williams v. Mutual Gas Co.*, 52 Mich., 499, 50 Am. Rep., 266, in speaking of the fact that the obligations of public service corporations to their customers and of the customers toward the corporation are mutual, each owing duties to the other: "The duty of the company toward the citizens and that of the citizen toward the company, is somewhat reciprocal, and any rule or regulation or course of dealing between the parties which does not secure the just rights of both ought not to be adopted, and cannot receive the sanction of the Courts."

Still another reason why complainant cannot succeed in his suit, even if he could be treated as a patron or customer of defendant, and if the question of his position being inequitable could be disregarded, is that his situation is such as to justify the placing of him in a different class from the ordinary user of electricity for illuminating purposes. There are a number of reasons that would justify placing him in a separate class, some of which are that a large part of the current he takes is taken in the daytime and not at night, whereas the ordinary user for illuminating purposes takes at night. Another reason is, even if he be regarded as a patron or user, that his demand is not for the ordinary use, but rather to require a supply held in reserve for him, and the amount of electricity that complainant would have to reserve or "keep in store" would be out of all proportion to the minimum charge. Other facts justifying his being put in a separate class are that complain-

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ant was taking more of the current than the ordinary light user, and, as already indicated herein, was using some of it for power purposes. While possibly no one of these special circumstances would justify putting complainant in a separate class from the ordinary user who takes current for illuminating purposes, we think it clear that all of them considered together would justify such course.

As said in Pond on Public Utilities, section 213, an observation bearing both on the question of classification and the fact that the right to be supplied with conveniences furnished by public service corporations is limited to ordinary uses for which such services are adopted: "There can be no absolute right to be supplied with the conveniences of municipal public utilities for the service furnished is necessarily limited to the ordinary uses for which it is adopted and to the locality where it is offered. And while the public service corporation cannot act arbitrarily or discriminate among its customers, present or prospective, where similarly situated, by way of favoring one customer of a class or one class over others, a distinction may be made between different customers or classes of customers on account of location, amount of consumption, or such other material conditions which distinguish them from each other or from other classes."

Another recent authority, Curtis on the Law of Electricity, at section 40, announces the following which is also applicable here: "To show a discrimination based on a difference in the rate charged similarity in all material respects must be shown in the circumstances and conditions of the two services, or the differences existing between the two services must be shown to be disproportionate to difference between the two rates. A difference in rate may be justified by a difference in the amount of current used, number of lights, the time of day electricity is furnished, dis-

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tance from the main or feed line, access to the property served, or in the appliances or other lights furnished in connection with the service. A higher rate per kilowatt hour may be charged a customer who does not agree to take any specified amount of current than is charged one who guarantees to use a certain amount of energy and to pay for the same whether used or not. And a lower rate may properly be allowed to a customer who consumes a certain amount and pledges himself to deal exclusively with the company for a stated period than to a customer who consumes a less amount without binding himself to take the current for any particular period."

For either or all of the reasons herein set out we are of opinion the decree of the Chancellor was erroneous, and it is reversed, but an injunction having been issued by the trial Court, and defendant having obeyed it, he has made a motion in this Court asking that the cause be remanded to ascertain damages resulting from the injunction, and in response to that motion the cause is remanded that an accounting as to damages may be had. Complainant will pay costs already accrued; the costs that may hereafter accrue will be adjudged by the Chancellor.

State *ex rel.* Abernathy v. Robertson.

STATE EX REL. W. H. ABERNATHY v. W. H. ROBERTSON.

(Jackson. January Term, 1914.)

1. **QUO WARRANTO.** *A proceeding in equity, whether brought in a Chancery Court or a Circuit Court, and a jury therein, governed by equity practice.*

Under our statutes, Shannon's Code, sections 5165, *et seq.*, providing for the bringing of a proceeding in the nature of a *quo warranto* in either the Chancery or Circuit Court, such proceeding wherever brought is an equity proceeding, and in such proceeding, though in the Circuit Court, issues of fact tried before a jury are governed by rules prevailing as to jury trials in Chancery.

2. **SAME.** *Jury trial is not an absolute right. Exists only when material issues are submitted.*

A trial before a jury in such proceeding as that just mentioned is not an absolute right, but exists only when material issues of fact are to be submitted, though the case is in a Circuit Court.

3. **SAME. SAME.** *Facts admitted in answer and not in issue not material.*

Facts admitted in an answer and on which no issue is raised by the pleading, are not such material facts as call for or justify their submission to a jury.

4. **COUNTY ROADS.** *Under control of county acting through its County Court.*

County roads are under the control of the counties, acting through their County Courts, and road commissioners, holding office under a legislative enactment providing for such commissioners having control of the roads of a county, are but county officers or agents.

State ex rel. Abernathy v. Robertson.

5. PUBLIC OFFICER. COMMITTEEMAN, ETC. *Rendered ineligible by becoming interested in contract he as officer, etc., connected with.*

By virtue of statutes, Shannon's Code, section 1133, *et seq.*, prohibiting officers, committeemen, directors, etc., whose duty it is to vote for, let out, overlook or superintend any work or contract in which a municipality, county or the State shall or may be interested, from themselves becoming interested in such contracts, and providing that for becoming so interested such officer, etc., shall be ineligible for such office for ten years, the officer, etc., *by committing the act prohibited becomes ineligible.*

6. SAME. SAME. *Cannot be reelected to such office during the period of disability.*

An officer, etc., rendered ineligible by violating the statutes during one term of his office cannot be legally elected to another term thereof during the ten years.

7. STATUTES, CONSTRUCTION. *Liberal construction when.*

The statutory provisions referred to in the sixth division of this syllabus, being meant to protect the public from official oppression and corruption, will receive a liberal construction.

8. APPEALS. *Only from final judgment as matter of right.*

Appeals as a matter of right lie only from final judgments or decrees, and no complaint can be based on the refusal of a trial Court to grant an appeal from an interlocutory order, where no abuse of discretion is shown in refusing it.

9. HARMLESS ERROR. *No reversal for. Instance.*

The error of a trial Court, if error, in refusing to permit a litigant to rely in an answer on grounds of an overruled demurrer, will not work a reversal where no prejudice resulted.

FROM LAUDERDALE COUNTY.

Appeal from the Circuit Court of Lauderdale County.
S. J. EVERETT, Judge.

State ex rel. Abernathy v. Robertson.

STEELE & STEELE for Plaintiff in Error.

CRAIG & BULLOCK and W. A. PATTON for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THE State of Tennessee, suing by Hon. John A. Tipton, Attorney General of the Sixteenth Judicial Circuit, on the relation of W. H. Abernathy, brought this suit in the Circuit Court of Lauderdale County against W. H. Robertson, a resident of that county who had been, preceding the time of the filing of the bill, and was at that time, acting as one of the Justices of the Peace of the county; the object of the suit being to restrain Robertson from acting as such Justice of the Peace, and have him declared ineligible to hold that office, and ousted therefrom. Robertson demurred to the bill, and his demurrer was overruled. He then answered under oath, the bill having prayed for such answer; and, on evidence offered by both parties, the cause went to trial before the Circuit Judge, and the relief prayed was granted. The cause is here on appeal of Robertson, and assignments of error in his behalf.

The first assignment is directed at the action of the trial Court in not granting an appeal from the order overruling the demurrer, and in denying the request of Robertson to be permitted to rely on the grounds of demurrer in his answer. This assignment can be best dealt with after the merits of the cause have been considered.

The second assignment complains at the action of the trial Court in refusing to submit certain issues of fact to a jury, thereby depriving defendant of a jury trial.

The third assignment goes to the merits of the cause, complaining at the action of the trial Court in decreeing

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defendant Robertson disqualified from holding the office of Justice of the Peace, and perpetually enjoining him from exercising the privileges and discharging the duties of that office.

We will first consider the complaint directed at the action of the trial Court in refusing to submit certain issues to a jury, as by so doing unnecessary repetitions will be avoided.

The bill was filed under our statutes providing for proceedings in the nature of a *quo warranto*, found in Shannon's Code, sections 5165, *et seq.* Section 5167, referring to and providing for such suits as that here involved, is, "The suit is brought by bill in equity, filed either in the Chancery or Circuit Court of the district (division) in which the office is usurped or held;" and section 5172 provides that, "Such issues of fact as may become necessary to try by jury in the progress of the cause, will be made up under the direction of the Court, and submitted to a jury empaneled forthwith."

By virtue of the provisions of this section 5167, as well as by virtue of the whole chapter of Shannon's Code, of which it is a part, which chapter contains the provisions of our statutes regulating the bringing of such suits as the one under consideration, we are of opinion this suit must be regarded as a proceeding in equity, notwithstanding the fact it was brought in the Circuit Court. If this view is correct, and counsel for both sides to this litigation so concede, it follows that the rules governing the trial of issues of fact before a jury in Chancery must be controlling here. In fact section 5172, just set out, clearly contemplates and provides for this practice. Regarding the proceeding then as an action in Chancery, the question is, what were and are the rights of defendant with reference to submitting issues of fact to a jury; and in answering that ques-

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tion it can be said that it is well settled in Tennessee, by our statutes and holdings, that a trial before a jury in Chancery is not an absolute right, but exists only when material issues of fact are to be submitted. Such is the logic of the following holdings which go to the point that where it is sought to submit to a jury immaterial issues only it is the duty of the Chancellor to disregard such issues, or even the findings of the jury thereon, where a trial before a jury has been had, and try and dispose of the cause just as if there had been no demand for a jury trial: *Gass v. Mason*, 4 Sneed, 497; *Ragsdale v. Gossett*, 2 Lea, 729-40; *Nelson v. Claybrook*, 4 Lea, 687. Bearing on this same question is the statement in a note in Gibson's *Suits in Chancery* (Rev. Ed.), to section 549, that, "If the issue tendered by a party be immaterial, the Chancellor may refuse to submit it, and proceed with the hearing without a jury, and make a decree as though no jury had been demanded. Dan. Ch. Pr., 1079, note." In fact, the very statute providing for jury trials in proceedings of the character of that at bar clearly means that such trials shall be had only when pertinent issues of fact have been submitted; that section providing for the submission of only such as may become *necessary* to try by a jury.

The question then is, were any of the issues of fact which defendant asked to submit to a jury such as to require that he be granted the jury, that is, such as were *necessary* to so submit? The issues proposed to be submitted, ten in number, were made up; and, in order to intelligently consider whether these issues, or any of them, were such as should have been submitted to a jury, it is proper to here make a more full statement of the charges preferred against the defendant than has hereinbefore been made, and on which it was sought to have him removed from office, and to state briefly the contents of his answer to those charges.

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The original bill charges that Robertson was first elected a Justice of the Peace of Lauderdale County in August, 1910, and was duly commissioned and took the oath and gave bond as such officer, and assumed the duties of the office on September 1st of that year; that he served under that election until September 1, 1912, he having been first elected to fill out an unexpired term; and that, at the regular election in 1912, he was reelected Justice of the Peace, and was again duly commissioned, and took the oath of office, and gave bond, and continued to act under his reelection, and was so acting at the time the original bill in this cause was filed; that at the April term, 1912, of the quarterly session of the County Court of Lauderdale County, that Court appointed defendant Robertson and two others a committee to finish certain work on a levee, a term used for a highway the county was having built at Double Bridges, the order appointing these men such committee being made on the application of Robertson himself; that after the appointment of the committee, it, the committee, employed defendant Robertson, one of its own members and himself a Justice of the Peace, to work on and superintend the building of the levee which was to be finished, and to be paid for such services at the rate of \$2.50 per day, which appointment defendant accepted; that, pursuant thereto, he did superintend the building of the levee until it was finished, on or about September 20, 1912, when an account was made out, including the sum of \$116.35 due defendant for his services under the employment, and approved by the committee, and presented to the County Judge; and that the Judge issued and delivered to the defendant a county warrant for the \$116.35, which sum was paid to him; and it is charged that in thus taking employment from the county, and receiving pay therefor, defendant violated our statute found in

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Shannon's Code, at sections 1133-4-5 (Act 1869-70, chapter 92), and was therefore and thereafter no longer eligible to the office of Justice of the Peace. These sections of our statute, as correctly set out in Shannon's Code, are as follows:

1133. "It shall not be lawful for any officer, committeeman, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend, any work or any contract in which any public municipal corporation, county, or the State, shall or may be interested, to be directly or indirectly interested in any such contract.

1134. "Should any person, acting as such officer, committeeman, director, or other person above referred to, be or become directly or indirectly interested in any such contract, he shall forfeit all pay and compensation therefor.

1135. "Such officer shall be dismissed from such office he then occupies, and be ineligible for the same or a similar position for ten years."

Defendant, as already stated herein, was called on to answer under oath certain questions set out in the original bill. The disclosures he was there asked to make are these: Whether he, defendant, was elected one of the Justices of the Peace of Lauderdale County in August, 1910, and was commissioned and took the oath of office and assumed the duties thereof pursuant to such election, and thereafter acted in that capacity; and whether, at the April term of the Quarterly County Court of that county, held in 1912, he was a member of said Court, and was appointed on a committee to finish the work on the levee at Double Bridges, the appointment being made at his own suggestion; and whether or not he did take the contract under the commissioners, he being one of them, to work on the levee at \$2.50 per day; and whether, acting with the other mem-

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bers of the committee, an account was made out for his services in that connection and approved, and whether he received in payment thereof a county warrant duly issued for the sum of \$116.35; and if he did not collect the amount therefor from the trustee of the county. In his answer defendant admits that he was elected and duly qualified a Justice of the Peace of Lauderdale County, both in 1910 and 1912, the election in 1912 becoming effective on September 2d, or that he qualified thereunder on that date; and admits that he did act as such Justice of the Peace from September 1, 1910, on up to and including the date of his second election, and had continued thereafter to act as such officer under his second election; and that at the quarterly term of the County Court held in April, 1912, a committee was appointed to do the work in finishing the levee in question, and that he, defendant, was present at that term of the Court acting as one of the Justices of the Peace of the county, and was appointed a member of the committee, the committee being composed of three members; but the answer says he did not take a contract from said committee to do the work, and had no pecuniary or profitable interest in said contract. Defendant says, however, in his answer, that he was "appointed by the said Court together with the other two members of the committee to finish the work on the levee at Double Bridges," and then goes on to explain that a part of the levee had already been built under the supervision of another party, but that the work had proved unsatisfactory, and had cost more than the committee thought it should cost, and that the committee solicited defendant to take supervision of the work and "to personally work on the job," and that he thereupon agreed to do this at a reasonable compensation per day, which it was agreed should be 25c per hour, or \$2.50 per day, for each day's work of ten hours.

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The answer admits further that pursuant to this agreement defendant did take supervision of the work on the levee, and did do work on it himself, saying that "He did this work under that contract with the Quarterly County Court;" and the answer admits that for that work the County Judge drew his warrant in payment. Defendant says in his answer that all of his "agreements and arrangements with the other two members of the committee were made while he was acting as Justice of the Peace under his commission which expired September 2, 1912, though it may be possible that a small amount of the work was actually done by him on the said levee after he had been re-elected and recommissioned and qualified on September 2, 1912." But the answer says that defendant's services in the matter were worth "every cent which the county paid him for same." Defendant then goes on to make explanation that in fact some of the \$116 was not due him, but due others to whom he says he accounted for it. He admits, however, that he actually received in his own right \$70.75 of the amount paid him. He explains that one of his sons and a step-son did some work under him, and that some of the money paid him was going to them, and was by him paid to them.

Thus it will be seen that, notwithstanding the fact that defendant denies taking a *contract* to do the work in question, he admits entering into an "arrangement and agreement" by which he not only became interested in doing the work but actually did some of it, admitting that the "arrangement and agreement" was made while he was an acting Justice of the Peace of Lauderdale County, preceding September, 1912, and that some of the work for which he received pay was done after September 1, 1912.

Now, with these admissions in the answer of defendant, we will consider the issues it was sought to have submitted

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to a jury. The first issue was whether or not the "case of *W. H. Robertson v. County Court*" was docketed, asking for an appropriation to be made at the first monthly Court "sitting last before the meeting of the Quarterly Court in April, 1912;" and the second issue was whether there was an appropriation made for the purpose of building or finishing the levee at Double Bridges at the April term of the Quarterly Court of Lauderdale County in 1912; and the third was whether or not three-fifths of the Justices of Lauderdale County were present at that April term of the Court. We think these issues were immaterial for more reasons than one; first, as is shown by the original bill and the answer of Robertson, the Court had taken steps before the April term, 1912, to have the work done on the levee, a part of which Robertson did, or which was done under him after the April term, 1912, but *when* the first steps toward having this work as a whole done were taken is not disclosed. Yet these questions, it is seen, assumed that the Quarterly Court had to make the appropriation at the April term, 1912, to pay for the work that was to be done under the supervision of Robertson and his associates who were at that term appointed a committee to have the balance of the work done. This assumption is clearly erroneous, because regular proceedings would have required the appropriation made before the work as a whole was begun, the work to be done under Robertson and his associates being merely the unfinished task of others, part of the work already having been done before the April term, 1912. Another reason why these issues were immaterial is that Robertson admits being paid for the work he did, the payment according to his admission being made by the county through regular channels. These admissions necessarily mean that the payment was regularly made; otherwise how could the money have been paid?

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Still another reason why these issues should not have been submitted to a jury is found in the fact that nowhere in Robertsons answer does he in any way make any question of the legality of the appropriation or proceeding under which he was paid, so that by these questions he sought to submit to a jury issues that were in no way raised by the pleadings. For these various reasons we think the Chancellor committed no error in refusing to submit to a jury the first, second and third issues it was sought to have submitted.

By the fourth issue made up Robertson sought to have a jury say whether or not he, Robertson, was directly or indirectly interested in the contract to build the levee; and by the fifth he sought to have submitted whether or not the work which he did was done under his commission of Justice of the Peace issued in 1910; and by the sixth and seventh issues he sought to have submitted whether or not he did any part of the work on the levee under his commission issued in 1912; and by the eighth he sought to have submitted whether he was paid anything for work he did while acting as Justice of the Peace under the commission issued to him in 1910. . These issues we think were all immaterial, because, under the facts admitted by Robertson in his answer, he was interested in doing the work on the levee, whether so interested in the original contract for building it or not; and according to his own admission so made he did do work on the levee for which he received pay under his commission of 1910; and he in effect admits, at least he does not deny, that he did work under his commission of 1912; but, regardless of this last matter, if he did work under his commission of 1910, and if, because thereof, he was rendered ineligible to hold the office of Justice of the Peace for ten years thereafter, as provided by the statute in question, we fail to see how the fact

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that he did work under his commission of 1912 could be material, a matter we will deal with more fully hereinafter.

The ninth issue sought to have submitted to a jury was as to the amount Robertson received for his work on the levee, and the tenth was as to whether Robertson did take a contract from himself and his associates to finish the levee in question. These matters were immaterial because in his answer Robertson admitted receiving in his own right the sum of \$70.75 for such work, and also by his answer he admitted taking the contract from the committee, or doing the work under it.

This disposes of all the issues it was sought to have submitted to a jury, and for the reasons given there was no issue that called for submission, and the action of the Court in denying a jury was therefore entirely proper.

We now come to the merits of the cause; and the first contention made on the merits is that the County Court of Lauderdale County had no authority to let the contract for the work on the levee or road, and that therefore our statute, Shannon's Code, section 1133, hereinbefore set out, prohibiting any officer, committeeman, etc., whose duty shall be to vote for, let out, overlook, or in any manner superintend any work or any contract in which any public municipal corporation, county or the State, shall or may be interested, from becoming directly or indirectly interested therein, has no application. This contention is based on the fact that a road law was passed in 1911 applicable alone, it appears, to Lauderdale County; and the theory is that that law was within and of itself complete on that question, covering all phases of the road law, and that by its provisions all laws and parts of laws in conflict with it were repealed, and that under that act the matter of working all roads was placed in the hands of three road com-

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missioners for Lauderdale County, and thereby taken from the County Court.

We have carefully read the Act relied on, and are unable to agree to the soundness of the contentions. In the first place, the Act does not cover all phases of the road law, and therefore is not, as contended, within and of itself a complete system of legislation on that question. Section one of that Act, after providing for three county commissioners, gives them power to take charge and supervision of all public roads, and appoint district commissioners, and then contains provisions regulating the conduct of district commissioners, among which is one requiring them to file reports with the county commissioners for use in the County Court; and just here, it will be observed that, if the County Court had lost, by virtue of the Act, all supervision over the roads, it is not conceivable what use that Court would have for such reports. Then other provisions of the Act authorize the County Judge to draw warrants for amounts due road hands and in payment of work done by district commissioners and road overseers; and the Act also authorizes and requires the County Court to levy the road tax, fix the number of days to be worked on the public roads; and also authorizes it to release men from road duty, all of which it is seen is in recognition of the supervision of the County Court over the public roads. Then section four of the Act expressly provides that civil districts in counties coming under its provisions desiring to do so may let the work to be done on their roads by contract, and provides that the district commissioner, in conjunction with the Justices of the Peace of the district, shall, in case of such letting of contract, have supervision and charge of the letting, thus again showing that the roads were not to be taken from under the control of the Justices of the Peace. Also, by section five of the Act provi-

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sion is made for widening roads, the costs of so doing to be paid by the county out of the district highway funds, or general fund of the county, thus again showing that the County Court was not meant to be released from all connection with the roads; and by section twelve of the Act similar provision is made for expenses of changing roads. Many other features of the Act might be referred to which clearly indicate that it was not the intention of the Legislature by passing the Act in question to take from the County Court the matter of supervision of public roads; but the most significant part of the Act is not what it does contain, but what it does not contain. It makes no provision whatever for constructing new roads, and necessarily leaves in force the general law on that question as it was before the Act was passed, under which that matter was wholly with the County Courts of the various counties. This is significant for the reason that, while it is not stated in so many words that the work being done in Lauderdale County, and in which defendant Robertson became interested and for the doing of which he drew pay, was the construction of a new road, it rather clearly appears that such is the fact. Robertson in his answer speaks repeatedly of the work being on a levee that was being *built*, and throughout the whole record it is referred to as if the work were being done in the building or constructing of a new road. Again, even if the Act were full within itself, as is in effect contended, the commissioners and other officers to whom the matter of having work done is delegated by the Act are simply county officers, or agents, and the control of the roads is at last with the county acting through its County Court. *Hamilton v. Taylor*, 15 Lea, 535; *Ledbetter v. Turnpike Co.*, 110 Tenn., 92; See also *Smith v. Carter* (Tenn.), 173 S. W., 430.

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Counsel for complainant present still another view of the cause why it is insisted the road law applicable alone to Lauderdale County could not be relied on by defendant as a defense to this suit, even if that law should be held to take the construction and control of public highways away from the County Court, which is that defendant, having taken the contract to do the work from a committee, and having received pay therefor from the county, is estopped from making the question that the county had no such control, citing *State v. O'Brien*, 94 Tenn., 79, and we do not mean to hold or intimate that this contention is unsound; but having found that the county had not lost such control over its highways, it becomes unnecessary to pass upon the question of estoppel.

We are further of opinion that the work done by Robertson and the receiving of pay therefor constituted a violation of the statute involved. That statute, the terms of which have been hereinbefore set out, prohibits any officer, committeeman, director, or other person whose duty it is to vote for, let out, overlook, or *in any manner superintend any work* or any contract in which any county is interested, from himself being directly or indirectly interested in it; and in addition to providing that he shall forfeit his pay by being so interested in violation of the statute, it expressly declares that he shall be dismissed from such office he then occupies, and be ineligible for same or a similar position for ten years. That statute was construed and applied in the case of *Hope v. Hamilton County*, 101 Tenn., 325, and again in *Madison County v. Alexander*, 116 Tenn., 685. In the last named case, one Alexander, a member of the County Court of Madison County, sued the county for \$4.56, the agreed value of some peas sold by him to the superintendent of the county workhouse, and it was agreed that the workhouse department needed the

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peas, and that they were worth the price that Alexander had charged for them, but pay was denied him; the Court there following the holding in the Hope case, saying: "The underlying principle is that no man shall be allowed to make a contract with the county whose duty it is to pay for such contract. In other words, he cannot make a contract to pay himself out of the public treasury for any such purpose. That such a rule may operate harshly is no argument against it. It is based on a wise purpose and principle, that is, to prevent public officials from using their public functions and duties to subserve their private interests. It does not matter that the service is rendered faithfully and inures to the benefit of the county, or that the material may be necessary and cheaply furnished."

"The service in the Hope case was faithfully rendered, and was worth all that was charged for it, and was necessary. So, here the provisions furnished were necessary and proper and sold at reasonable rates; but the policy of the statute is that a public official may not contract with the body of which he is a member, because it may lead to other contracts very detrimental to the public interests.

"As is said in *Tool Co. v. Norris*, 2 Wall., 45; 17 L. Ed., 868: 'The law looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in the Courts of the country.'"

Applying those holdings, we think, under the provisions of section 1135 of Shannon's Code, the Circuit Judge had but one course left to him, and that was to dismiss Robertson from the office of Justice of the Peace, and declare him ineligible for the same or a similar position for ten years. We are of the opinion further that by virtue of the very wording of the statute Robertson was rendered ineligible by the Act of taking the contract under the county or the commissioners, of which he was one, and doing the

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work he did and receiving pay for his services, the wording being that "he *shall* be ineligible;" and we think further that it is not material whether he did any of the work or received any of the pay after his commission of 1912 was issued, the law being, as held in *Puckett v. Bean*, 11 Heis., 600, that the election to an office of one not eligible there-to is simply void; with which holding the cases of *Lewis v. Watkins*, 3 Lea, 174, 181, and *Day v. Sharp*, 128 Tenn., 340, are in exact accord. The last named case is specially in point here, because there it was contended, as here, that the offense which had rendered the officer ineligible had been committed before the new term of office had begun, but it was pointed out by our Supreme Court that that disability extended over into the next term, just as it necessarily did in the case at bar. True, the disabilities in the cases referred to arose under provisions of our Constitution, while in the case at bar the disability arose under a provision of our statutes. We do not regard this as material, however, for the reason that our Constitution does not attempt to define eligibility to the office of Justice of the Peace, except as eligibility is prescribed as a test to office generally, the question of eligibility to that office, with the exceptions named, being left to the legislative department of the government; and when that department has spoken within its authority its word is as binding as a declaration of the Constitution itself. For these reasons we think the trial Court properly held defendant ineligible to the office of Justice of the Peace.

We might here pause to observe that the statute which defendant violated is a wholesome one, enacted to protect the public from official corruption and oppression; and, though it is drastic in some of its provisions, it should be liberally construed so as to effectuate the objects sought. Such has been the course taken by our Supreme Court in

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the Hope and Alexander cases hereinbefore referred to, and such we regard it our duty to take in the instant case. Further, the evidence in this case shows that defendant was doing the very work that another had done at a less figure, and done equally as well as defendant did it, according to some of the evidence offered by defendant himself. At this we are not surprised, as the inevitable tendency of such course as that pursued by defendant and his fellow committeemen is to extort from the public.

We now revert to the contention that the trial Court committed error in not permitting defendant to appeal from the order overruling the demurrer, and in not granting him permission to rely in his answer on the grounds of the demurrer which was overruled. As to the refusal of the Circuit Judge to grant an appeal from the order overruling the demurrer, the answer to the contention is that appeals as a matter of right lie only from final decrees and judgments (*Younger v. Younger*, 90 Tenn., 25, and cases there cited), and, no one having been prejudiced by the refusal of the trial Court to grant the appeal, no abuse of his discretion is shown, and there is no ground of complaint. As to the refusal to grant defendant permission to rely on the grounds of demurrer in his answer, it is not necessary to do more than call attention to the fact that from what has been said it is seen that defendant was in no way prejudiced by that act of the trial Court, even if it had been erroneous; the demurrer making the question, first that the contract which Robertson had entered into was not such as the statute was leveled against, and, second, because the transactions took place while the defendant was acting under his commission issued in 1910 it did not apply to him. Under the law no prejudice having resulted to defendant he is not in position to complain before this Court. *Shaw v. Bowen*, 1 Overton, 248; *Brown v. Mc-*

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Reynolds, 5 Sneed, 639. It is also seen that in fact the demurrer was properly overruled, and, being properly overruled, in no view of the case was there any occasion for granting permission to rely upon the grounds thereof in the answer.

The result is the decree of the Circuit Court is correct, and it is affirmed with costs.

JOHN H. TRUETT, TRUSTEE, v. E. R. COOK, ET AL.

Writ of certiorari denied by Supreme Court.

(*Nashville*. March Special Term, 1915.)

1. **RES ADJUDICATA.** *Matters said only arguendo not an adjudication.*

The language of an Appellate Court in passing on the act of a trial Court in striking from a pleading certain allegations because in his view irrelevant, which language was meant only as observations to show the relevancy of the allegations stricken from the pleading, and where the case is reversed and remanded because of the error of the trial Court in striking the allegations, does not amount to an adjudication of the issue as to which the stricken allegations were pertinent, though the language taken alone might appear to pass on such issue.

2. **WILLS. CONSTRUCTION.** *Reference to death of devisee without issue, when does not mean death of testator.*

Where testator, being a physician himself, had been afflicted for some months with typhoid, and then with other troubles, came to the conclusion that he could not recover and was liable to die at any time, made his will only eight days before his death, giving to a son then only eight years old his estate, the will providing, "I will and bequeath that in the event of the

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death of my said son . . . without living and legitimate issue, all my property as herein above bequeathed and disposed of shall revert to my estate and be equally divided among my nearest kin," such reference to death, under the circumstances, did not mean death in the lifetime of the testator.

3. SAME. SAME.

Also where such a gift as that set out in the preceding head-note is preceded by an intermediate estate for life or for years, and is *not immediate*, the reference to death does not mean death before the testator, but means death at any time before the termination of the intermediate estate, so that the devisee, to become vested with a fee, must survive the intermediate estate, but on surviving it does become vested with a fee he can convey.

FROM WILLIAMSON COUNTY.

Appeal from the Chancery Court of Williamson County.
DOUGLAS WIKLE, Chancellor.

W. T. SMITH, W. W. FAW and R. H. CROCKETT for
Complainant.

PITTS & McCONNICO and P. E. COX for Defendants.

MR. JUSTICE HUGHES delivered the opinion of the
Court.

THIS suit was brought in the Chancery Court of Williamson County, in May, 1912, for the purpose, primarily, of obtaining a construction of certain provisions of the last will and testament of Phillip H. Cook, who died in 1872. The cause was before this Court at its September term, 1912, and the action of the lower Court, insofar as it was then here for adjudication, was reversed, and the

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cause was remanded; and the first question to be now passed on is whether or not our former decision was such an adjudication as to the proper construction of those portions of the will involved as to preclude further inquiry in regard thereto; it being contended by defendants that the former decision of this Court did become and is now final as to the proper construction of the will, while complainant contends otherwise. For the purpose of disposing of the question, as well as for the purpose of dealing with the proper construction of the will of Phillip H. Cook, deceased, if we find that the question of its construction is still open to investigation, it is necessary to set out such parts of the will as are material to the investigation. And here it is proper to say that the question at issue arising on the construction of the will is whether the testator's son, Richard Reese Cook, took a fee simple title to certain realty it is conceded by all parties passed under it, or whether he took a determinable fee thereto. The contention of complainant is that, under the provisions of the will, and especially the third clause thereof, Richard Reese Cook became vested with an absolute fee in the lands, while defendants contend that the son, on the death of his father, became vested, not with a fee simple title, but with a determinable fee.

The portions of the will in question are items one, two and three, which are as follows:

"Item 1st.

"I will and bequeath to my beloved wife Laure E. Cook and my son Richard Reese Cook the use and benefit of all the proceeds arising from my estate in the following manner with the exception of the special bequests hereinafter to be made. That is, I hereby will and direct that a trustee be appointed who shall take charge of the proceeds of my estate as above mentioned and that he pay over to

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my beloved wife Laura E. Cook annually the interest and profits arising from said estate, to be expended for the support of herself and my son Richard Reese Cook. But in the event that the interest and profits of the same exceed what is sufficient to comfortably maintain and support my beloved wife Laura E. Cook and my son Richard Reese Cook, then and in that event I will and direct that the amount of such excess of interest and profits as aforesaid shall be added to and become a part of the principal of my estate. And I hereby will and direct that in considering the amount necessary for the comfortable maintenance and support of my beloved wife and son, the interest and profits of her own estate shall be taken into and made a part of the estimate.

“Item 2nd.

“I will and bequeath that whenever and as soon as the interest and profits of the estate of my beloved wife Laura E. Cook shall be and become sufficient for the comfortable support of herself, then and in that event I will and direct that the interest and profits of my estate, together with the principle as above willed and bequeathed, shall go to my son Richard Reese Cook, and that if my said son is not then twenty-one years of age, a guardian shall be appointed for him, who shall receive and take charge of the same as provided by law.

“Item 3rd.

“I will and bequeath that in the event of the death of my son Richard Reese Cook without living and legitimate issue all my property as herein bequeathed and disposed of shall revert to my estate and be equally divided among my nearest kin. But in that event I will and direct that the same share going and descending to my brother Nicholas Cook shall be paid over to a trustee to be appointed

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for him as the law directs, and that said trustee shall annually pay to my said brother Nicholas the interest and profits arising from his said share in my estate."

Now, as to the scope and effect of the decision of this Court rendered at its September term, 1912, the further facts necessary to be stated are these: The original bill alleges the death of the testator in 1872, and the probate of his will at the February term of the County Court of Williamson County in that year, and that the widow had died since the death of her husband; and it sets out and describes a certain tract of land of one hundred and sixteen acres in Williamson County which passed to the son Richard Reese Cook under the will, and alleges that the son had, by warranty deed executed in 1895, conveyed all of his interest in the one-hundred-and-sixteen-acre tract of land to one Joseph L. Parker, and that Parker had conveyed the realty to complainant John H. Truett in trust for the benefit of himself and others; that Richard Reese Cook was still living, aged about forty, but that he was only about one year old when the will was executed by his father; that the father meant by the expression in the third item of the will, "in the event of the death of my son Richard Reese Cook without living and legitimate issue," to refer to the death of the son before his, the testator's death, and to make the property go to others only in that event, but meant if the son survived the father, this should not occur--that in that event he was to take an absolute unqualified estate in the property given him, and that the son, having survived his father, took an absolute estate, so that his vendees became vested with such an estate. The bill then sets out that the one-hundred-and-sixteen-acre tract of land needed certain work done on it in the way of protecting it and preventing deterioration in value, but that these improvements could or

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would not be made by complainant unless the title was so settled that complainant and those for whom he held could have it determined that they took the property in fee. Those who would answer the designation of the "nearest kin" of Philip H. Cook, deceased, if the son Richard Reese Cook were not living, were made defendants to the bill along with Richard Reese. The defendants other than Richard Reese Cook answered the bill, admitting the death of Philip H. Cook in 1872, that he died testate, and that his widow had died since his death; and in their answers they set up and plead that at the time the will was executed the testator was on his death bed; that at that time he knew his condition was hopeless and so expressed himself, and that it was for that very reason that the will was executed at that time, and that in fact he died on the eighth day after the will was executed. And they deny that the expression in the third item of the will, "in the event of the death of my son Richard Reese Cook without living and legitimate issue," refers to the son's death in the lifetime of the father, but say when the circumstances and surroundings of the father at the time the will was executed are taken into consideration they (the circumstances) show, and that it is a fact, that the father meant to refer to the death of the son after his death, and that, therefore, if, when the son dies, he leaves surviving him no "living and legitimate issue," defendants will take the property. Complainant excepted to the portions of the answers setting up and pleading that at the time the will was executed the testator was on his death bed, that his condition was then hopeless and that he so knew and so expressed himself, and that his will was executed for that reason, and to other expressions of the answers seeking to set up and plead the surroundings and circumstances of the testator at the time of the execu-

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tion of the will; and they moved the Court to strike from the answers those portions thereof. That motion by complainants was sustained by the trial Court, that Court holding the matters objected to irrelevant; and after the motion was sustained, but at the same term of Court, the cause was heard on the original bill and exhibits and *pro confesso* and the answers, the case being set down for hearing on bill and answers as the entry on the minute of the Court shows. The Court, thus hearing the cause, held that Richard Reese Cook took the lands in question in fee, whereupon defendants excepted to the decree of the Court finally determining the questions at issue, and to the decrees theretofore made, and appealed to this Court. It was on this appeal that this Court, in an opinion prepared by Presiding Judge Wilson, reviewing the case at great length and with much ability, held that the Chancellor committed error in expunging from the answers the allegations with reference to the surroundings and circumstances under which the will was executed; and that opinion repeatedly expressed the view that the will was not susceptible of the construction the Chancellor had put on it. In concluding the opinion of this Court it was then said:

“We hold, therefore, that, examining the will in hand as a whole, in view of the surrounding circumstances and the condition of the testator at the time his will was made, as averred in the pleading, he (Philip H. Cook) did not contemplate his son, R. R. Cook, would die before he did, and the he had a fee simple estate contingent upon dying leaving legitimate issue.

“If correct in these views, it follows that the learned Special Chancellor was in error in striking out the parts of the answer alluded to, thus denying the right of appellants to show the existing conditions surrounding the tes-

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tator at the time he made the will, and in holding that, irrespective of whether R. R. Cook died without living legitimate issue, he took a fee in the will of his father.

"The cause will be remanded to the Chancery Court of Williamson County for further proceedings in accordance with the opinion of this Court."

It is seen from the language just copied used by Judge Wilson that he was expressing views as to the meaning of the will, examining it "in view of the surrounding circumstances and the condition of the testator at the time the will was made as averred in the pleadings"; and it is seen that the error that the Chancellor committed, as expressly pointed out, was in striking out those parts of the answers pleading the conditions and surroundings of the testator at the time the will was executed, and in construing the will irrespective of those conditions and surroundings. Now, when these matters are considered, we think there can be no serious controversy as to the scope of the question or matter actually decided by this Court. While it was not in so many words said in the opinion of Justice Wilson that it was his meaning to simply speak of the proper construction of the will on the theory that the conditions and surroundings of the testator were as set up in the answers as originally filed, there can hardly be any question that this was his only meaning. What was said, of course, was said for the purpose of showing the importance and necessity of incorporating in the answers the matters that had been stricken out. For this Court, with the allegations as to testator's surroundings and circumstances stricken out, to have unconditionally passed on the meaning of the will would have been to treat the allegations, not only as in the answers, but as if they had been admitted to be true or had been established by evidence. Yet the very error that this Court held the

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trial Court committed was that he struck the allegations out and passed on the proper construction of the will as if they were irrelevant and unimportant. Of course this Court was not guilty of any such absurdity. Again, there would have been no occasion for remanding the cause if this Court had meant to unconditionally and finally construe the will. If it had so meant, the only theory on which it can be conceived that this Court would have remanded the cause would have been to sell the lands for partition of the proceeds among the parties in interest, a matter prayed for in the original bill. Yet, although there was a prayer in the original bill for partition, it is clear that if Richard Reese Cook took or now has, or if his vendees now have, only a qualified or determinable fee, as defendants insist, as he is still living and might yet have, and die leaving, living, legitimate issue, it is apparent there could in no event be a case made for partition, and therefore there could have been no reason to remand for any such purpose. We are therefore clearly of opinion that the former adjudication of this Court in no way became a final adjudication on the proper construction of the will in such sense as to preclude the question being now passed on. We will therefore now consider its proper construction.

It is seen that, after making provisions in the first item of the will for the support of his wife and son out of the interest and profits arising from his estate, the testator, in the second item of his testament, expressly wills and bequeaths that whenever and as soon as the interest and profits of the wife's estate should become sufficient for her comfortable support, then the interest and profits of his estate, "*together with the principal,*" should go to the son; and that then follows a provision with reference to the appointment of a guardian if the son should not, at the time

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thus fixed for him to become vested with the principal, be twenty-one years old; and it is seen that then in the third item follows the language that gives rise to this lawsuit, which is: "I will and bequeath that in the event of the death of my said son Richard Reese Cook without living and legitimate issue, all of my property as herein above bequeathed and disposed of shall revert to my estate and be equally divided among my nearest kin." In other words, the testator provides first for the support of his wife and son out of the proceeds of certain of his estate, and does not give anything to the son until the proceeds of the wife's own estate shall become sufficient for her support, but he provides when that event shall happen, the son shall become vested with, not only the interest and profits of his estate, *but the principal itself*; and then it is, after thus unconditionally giving to the son whatever he means to give him, the words are used which cut down that absolute and unconditional gift, if it is cut down to anything less than an unconditional fee. And, relying on the holdings of our Supreme Court in *Vaughn v. Cator*, 1 Pickle, 302; *Meacham v. Graham*, 14 Pickle, 190; *Katzenberger v. Weaver*, 2 Cates, 261; *Frank v. Frank*, 12 Cates, 569, and some unreported cases, counsel for complainant most earnestly insist that by virtue of this language referring to the death of the son the testator did vest him with only a determinable fee. Let us see.

In *Vaughn v. Cator*, the testator, after giving certain property to Basil Smith in the body of his will, provided in a codicil that "in the event Basil Smith dies without lawful issue, then the property therein bequeathed shall revert to my estate, and be equally divided among the other named heirs in said will, of which this is a codicil," and the reference there to the death of Basil Smith was held to mean his death in the lifetime of the testator.

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How similar the expressions in the two wills, that involved in the Vaughn-Cator case and that no under consideration. In each death is referred to as "in the event" of death of the devisee or legatee; in the one now under consideration it is in the event of death "without living and legitimate issue," and in the other it is in the event of death "without lawful issue," that is referred to; in the one now under consideration the property already given, in the event named, is to "revert to my estate and be equally divided among" others named, and in the other case the property already given, in the event named, was to "revert to my estate and be equally divided among" others named. It would appear that, with such sameness of expressions, *if we are not to go beyond that language* in the will under consideration which we have pointed out, the same result that was reached as to its meaning in the Vaughn-Cator case must be reached here. And we think such a view cannot be escaped. We also think that in like manner the reference in *Meacham v. Graham* to the death of a daughter as, "in the event of her death without living children;" and that the reference in *Katzenberger v. Weaver* to death as "in case any of my children herein named shall die;" and that reference in the case of *Frank v. Frank* to death as, "if any one of my sons shall die without issue his or her share shall also revert to my children then living," must govern in the construction of the will under consideration, *if we are not to look beyond the words* referreing to the death of Richard Reese Cook. All of those expressions are held to refer to death in the lifetime of the testator, and the principal underlying those holdings, we think, *if we are not to look beyond the words* of the will of Phillip H. Cook, deceased, *referring to the death of the son*, forces the same conclusion as to the meaning of these words. But after this case was re-

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manded, and after parts of the answers which had been stricken therefrom had been restored by the Chancellor, and when proof was taken on the issues raised, it was shown without contradiction that the testator had been afflicted with typhoid for some months before his death; that he had been confined to his room at his home, some two, three or four miles in the country from Franklin, for a considerable part of this time, when his physician came to the conclusion that the sanitary conditions were not the best at his home, and therefore had him taken to Franklin, where conditions would perhaps be better, but that after being taken to Franklin he was attacked with other troubles, and after being there for some time, and after realizing that he could not recover, but was going to die (testator being himself a physician of ability), and while in a very weakened physical condition, he had his will written, practically dictating it in his own language, and then signed it and had it witnessed; that this was done on February 2, 1872, and he died on February 10th, or eight days thereafter. In brief, the evidence discloses that at the time the will was executed the testator expected to die at any time; and it is shown that his son Richard Reese, an only child, was at that time only a little more than one year old, having been born on January 16, 1871; that while the son was not a vigorous, strong child, there was nothing to indicate or even suggest that he would not survive his father.

Under this state of facts counsel for defendants rely on our cases of *Hottell v. Browder*, 13 Lea, 676, and *Stovall v. Austin*, 16 Lea, 700. And truly the *Hottell-Browder* case presents conditions surrounding the execution of the will, the construction of which was there involved, very similar to the conditions surrounding Phillip H. Cook, deceased, when his will was executed; the will in that case

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having been executed at a time the testator was on his death bed, very low, unable to sit up, and who then told the draftsman of his will that he never expected to recover. The will in that case, after giving to the testator's two daughters certain property, real and personal, provided that "in case of the death of either of my said daughters above named, then and in that event all that part of my estate which hereby I give to her shall go to and descend to her children," but that language, although such as within itself would have meant the death of the daughters before that of the testator, was held, because of the conditions and surroundings attending the execution of the will, to not refer to death before the testator; and it is apparently on the same basis that the case of *Stovall v. Austin* was decided. If we are to follow these cases, rather than those relied on by complainant, we think it clear that death of the son referred to in the will of Phillip H. Cook, deceased, must likewise be held to not refer to the death of the son before that of the testator. Are they still regarded as sound? We do not understand that the *Hottell-Browder* case has ever been overruled or that the soundness of the holding therein has ever been questioned in any subsequent case. On the contrary in the *Katzenberger-Weaver* case both it and the *Stovall-Austin* cases are referred to as correct under their particular facts; and in the case of *Frank v. Frank* it was remarked "that the peculiar facts found to exist in *Hottell v. Browder*, 13 Lea, 676, and *Stovall v. Austin*, 16 Lea, 700, were held in those cases to warrant a departure from the rule;" the rule referred to being, as also set out in the *Frank-Frank* case, as follows: "If there is an immediate gift to A. and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only

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in the event of A.'s death before the testator." In fact, none of the cases that have applied the rule just quoted are at war with the Hottell-Browder case and the Stovall-Austin case. In other words, the two lines of cases are recognized as both sound when the two last named cases are viewed in the light of their own facts; and we think if the will now under consideration is to be governed in its construction by the one line or the other of these cases the Hottell-Browder case and the Stovall-Austin case must be controlling; but we are of opinion that the proper construction of the will under consideration depends on still another principle not applied by either line of cases referred to.

In 2 Jarman on Wills (Sixth American Ed. by Biglow), in chapter 48, headed "WORDS REFERRING TO DEATH SIMPLY, WHETHER THEY RELATE TO THE DEATH IN THE LIFETIME OF THE TESTATOR," and under the subheading, "Rule where the Gift is Immediate," and on star page 1564, is found the following:

"Where a bequest is made to a person, with a gift over *in case of his death*, a question arises whether the testator uses the words 'in case of,' in the sense of *at* or *from*, and thereby as restrictive of the prior bequest to a life interest, *i. e.*, as introducing a gift to take effect on the decease of the prior legatee under all circumstances, or with a view to create a bequest in defeasance of or in substitution for the prior one, in the event of the death of the legatee in some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent; that circumstances naturally is the time of its

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happening; and such time, where the bequest is immediate (*i. e.*, in possession), necessarily is the death of the testator, there being no other period to which the words can be referred.

"Hence it has become an established rule, that where the bequest is simply to A., and *in case of his death*, or *if he die*, to B., A. surviving the testator takes absolutely."

Then, after commenting on this proposition, and in the same chapter, but under the subheading, "Rule where the Gift is Future," at star pages 1568-9, is found the following:

"But although in the case of an *immediate* gift it is true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made *ex necessitate rei*, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty; and, consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease), the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession. . . . On this principle, too, it should seem that in the case of a bequest to A. at the age of twenty-one years, and *in the event of his death* then over to another, the words would be construed to mean, in the event of his dying under twenty-one at any time.

"And the same construction has obtained where payment only, and not vesting, was postponed to a stated period."

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These propositions taken from Jarman on Wills have all been expressly approved by our Supreme Court in the case of *Katzenberger v. Weaver*, 2 Cates, 620, except the two concluding paragraphs showing when the rule applicable to gifts *not immediate* will be applied. In other words, the rule with reference to *immediate* gifts and rule when the gift is *not immediate* have been expressly approved by our Supreme Court. And such rules have met the approval of the American Courts generally, although a few of the Courts do not recognize either. As said in 40 Cys., 1504-1506:

"It has been held that where there is an immediate gift to a person and a gift over on the death of the beneficiary without issue, the latter gift, in the absence of words indicating a contrary intention, takes effect upon the death without issue, happening at any time, as well after as before the death of the testator; but as a general rule, in such cases, the gift over refers to death occurring during the lifetime of the testator, unless it appears from the context of the will and the surrounding circumstances that the testator intended the gift to take effect upon the death of the person named at any time, as well after as before the testator's death. But where the disposition of the property which is devised over is preceded by a prior estate for life or years, then the general rule is that the death without issue refers to a death occurring during the period of the intervening estate, such as before the death of the life-tenant, unless there are words in the will which show that the testator intended to refer to a death occurring before his decease, or at a later date than the termination of the particular estate."

In support of the general rule with reference to immediate gifts as thus expressed in Cyc., and in support of the

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general rule as there laid down where there is an intervening estate, many cases are cited. In support of the general rule applicable where there is an intervening estate, and as affording illustrations of its application, showing that such expressions as that found in the will of Philip H. Cook used in such connection as it is used in his will, refers, not to death in the lifetime of the testator, but to death at any time before the termination of the estate intervening between the death of the testator and the vesting of the estate in the person whose death is referred to, we refer to the following as being especially applicable: *Reuling v. Reuling*, 137 Ky., 637; *Bradshaw v. Williams*, 140 Ky., 160; *Simpson v. Adams*, 127 Ky., 790; *Birney v. Richardson*, 5 Dana, 424; *Miller v. McBlain*, 98 N. Y., 517; *Mayer v. Walker*, 214 Pa. St., 440; *McCormick v. McElligott*, 127 Pa. St., 230, 14 Am. St. Rep., 837; *Fitzwater's Appeal*, 94 Pa. St., 141; *Unstead's Appeal*, 60 Pa. St., 365; *Howell v. Gifford*, 64 N. J. Eq., 180; *Blum v. Evans*, 10 S. C., 56.

Now, bearing in mind that the rule is applicable where the gift is not immediate, but where it is to take effect in the future, and that it has been held to become applicable where payment only, and not vesting, was postponed, as stated in the language quoted from Jarman on Wills; and bearing in mind that, under the express provisions of the second item of Philip H. Cook's will, his son could not so much as become vested in his own right with either the payment of the income or with the principal until the testator's wife's estate should become sufficient for her comfortable support, a time spoken of as still in the future as compared to testator's death, it is clear that this rule with reference to gifts taking effect *in the future* and not *immediately* on the death of the testator becomes the controlling rule as applied to the will of Philip H. Cook. Under

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that rule the death referred to is death before the time that the estate would become vested in the son, and the fact that the testator was on his death bed at the time he made his will could not in any way militate against the application of this rule, as that reference is to a date beyond his own death. Stated differently, as the death of the son referred to is one that must occur beyond testator's own death, the fact that testator was on his death bed when the will was made could have nothing to do with the application of the rule which makes the estate vest at a date beyond the testator's death. And it being made to appear that the son did live until and beyond that future event, he being still living even after his mother's death, then he did not die within the time referred to in the will of his father, and his estate became a fee at the happening of the future event, and he had a right to dispose of that estate as he saw cause. In this view of the case, and for these reasons, the Chancellor's decree is correct, although not put on the grounds on which he put it, and it must be affirmed, his last decree being in accord with his first.

This is a view of the case that did not occur to this Court when the case was before it in 1812; otherwise there would have been no necessity for a remand of the case, for, as just indicated, the surroundings and circumstances of the testator at the time the will was executed can mean nothing if by the death referred to in the will death was meant at some date subsequent to testator's death.

It is disclosed that the widow of Philip H. Cook, deceased, dissented from her husband's will, and it might be said that this circumstance would prevent the application of the rule we have just held controlling, but we think such suggestion must necessarily be without any force or effect, for the reason that, as is too well settled to do more than call attention to the fact, wills become effective at once on

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the death of the testator, and whatever rights Richard Reese Cook got under the will of his father to the lands in question depended not on what his mother might, after the death of her husband, do in the way of dissenting from the will, but on the will itself and the contingency mentioned in it. In other words, the will gave to the son a certain character of estate to depend on a contingency to happen after testator's death, and the son's condition at that time with reference to being alive, or if dead, survived by living legitimate issue, and not on anything the testator's widow might do in the way of dissenting from the will or otherwise.

Further, the view we take of this case does no violence to any rule governing the construction of will, and does not run contrary to any of our holdings, and carries out the clearly expressed intention of the testator. It not only recognizes both the rules applicable where death is referred to as a contingent event, and where the gift is immediate, and when there is an intervening estate, but it recognizes the rule that "the law favors the vesting of estates at the earliest possible time," and the further rule that "if the expression in the will is doubtful, the doubt is resolved against the limitation and in favor of the absolute estate," both of which last-named rules, with citation of many cases in support, are announced and applied in the case of *Meacham v. Graham*, *supra*. It is also in harmony with the holding of this Court in *Johnston v. Hoyall*, 2 Tenn. C. C. A., 163, concurred in by our Supreme Court, where the fact that the rule applied in the cases of *Vaughn v. Cator*, *Meacham v. Graham*, *Katzenberger v. Weaver*, and *Frank v. Frank* has no application when the gift to the person whose death is referred to as a contingent event is not immediately to him is pointed out and became the basis of the decision. Nor would the suggestion be apposite

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that the testator did not mean any such result as we have just held followed under the law. As has been frequently said, it is not the secret intentions of testators that are sought in the construction of their wills, but their intentions *as expressed in their wills*; and, whatever the secret intentions of Philip H. Cook may have been, his language used in his will in reference to the death of his son, under the well-settled rules of law, meant and means such death before the date when the estate would become vested in the son.

It might be said that the holding in *Meachem v. Graham*, 14 Pickle, 190, is against our holding in the construction of the will now under consideration, as in that case it was directed by the will, the construction of which was involved, that in certain contingencies a trustee was to hold the property for the use and benefit of the daughter whose death was referred to, and which reference was held to mean death in the lifetime of the testator. But in that case, while it is true a trustee was to act in certain events, the will had preceeding that, and in express terms, given the property direct to the daughter, so that no title was to be vested in the trustee there as in the will of Philip H. Cook, deceased. The controlling difference in the two cases is that in the will of Samuel H. Graham the property was first expressly devised to the daughter, and the trustee was simply to control it in certain contingencies, while in the will of Philip H. Cook the gift was first of the proceeds to the wife and son with an express gift of the corpus as well as the proceeds to the son only when it transpired in the future that the interest and profits of the wife's estate should be sufficient for her comfortable support. In other words, in the Graham will the testator gave directly to the daughter an estate to become vested in her on his death, and simply provided for the management of his

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property in certain events; while in the will of Philip H. Cook the gift of the corpus of testator's estate which was to go to the son, Richard Reese Cook, was not to become effective till the happening of an event still in advance of the death of testator.

We do not mean to say that holdings cannot be found in some jurisdictions contrary to the conclusions we have reached, and it is wholly useless to go out of the State to review other holdings, for, as indicated by the quotation we have herein made from 40 Cyc., the holding of the various Courts on all these questions that arise out of the use of expressions indicating death as an uncertain or contingent event, are more or less diverse. Tennessee has aligned herself with those jurisdictions that recognize the rules applicable when death of a devisee or legatee is referred to as a contingent event, and the particular rule applicable to the facts of the case now under consideration has been expressly approved by our Supreme Court, though no case passed on by it has, so far as we know, called for its application. We therefore have no hesitancy in applying the rule.

For the reasons indicated we are constrained to, and do, hold that the decree of the Chancellor construing the will of Philip H. Cook, deceased, was, and is, correct, and it is affirmed, with costs.

Royston v. Car Works.

J. M. ROYSTON, ADMR., ETC., v. LENOIR CAR WORKS,
ET. AL.

Writ of certiorari denied by Supreme Court.

(Knoxville. September Term, 1914.)

1. MASTER AND SERVANT. *Instrumentalities furnished by master, when prima facie sufficient.*

The fact that an appliance or instrumentality furnished by the master to his servant was of an approved pattern and was bought of a reputable maker is *prima facie* evidence that the master was not negligent in requiring the servant to use it.

2. SAME. *Inspection of instrumentalities furnished by master, burden on servant to show failure to make and result if made.*

The burden is on the servant suing the master for personal injuries to show that the master failed to make reasonably careful inspections at reasonable intervals, of instrumentalities furnished by him, and that such inspections if made would have disclosed defects which led to the injuries in time to permit repairs in the exercise of reasonable care.

3. SAME. *Simple tool, what is and what is not depends on circumstances.*

What is or what is not a simple tool within the rule exempting the master from the duty of inspecting and keeping in repair depends on the facts of each case, so that a given tool or appliance might, under the facts of one case, be held a simple tool, while under the facts of another it might not be so held. The nature, character, and simplicity or complexity of the tool, and the opportunity of the servant for observing it are the controlling matters.

4. SAME. *Same. Hook a simple tool where servant brought in constant contact with it.*

A hook at the end of a chain and used, after the chain has been wound around any object to be lifted by the chain, to simply slip over the chain, but which, because not sufficiently

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bent, slips from the chain over which it was hooked and thereby lets the object fall is a simple tool where the servant in using the hook was brought in immediate contact with it every time used.

FROM LOUDON COUNTY.

Appeal from Circuit Court of Loudon County. ———, Judge.

ALLEN & CLARK, for Plaintiff in Error.

JAS. B. WRIGHT, L. D. SMITH and CHARLES H. SMITH for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

J. M. ROYSTON, acting in the capacity of administrator of the estate of his son, Wm. B. Royston, brought this suit in the Circuit Court of Loudon County against Lenoir Car Works and Southern Railway Company, to recover damages because of alleged negligence of the defendants which it is charged brought about the death of his son.

At the conclusion of the testimony offered on behalf of the plaintiff the trial Court, on motion being made therefor, directed a verdict in favor of defendants and judgment was entered thereon. Plaintiff, after his motion for a new trial had been overruled, appealed to this Court, and by assignment of error duly made, complains at the direction of the verdict.

Plaintiff's intestate was nineteen years and six months old at the time of his death, and was an intelligent young

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man. He had been in the employ of the Lenoir Car Works for some months previous to the time of receiving the injuries which resulted in his death, but had not been engaged in the particular work he was doing at the time he received the injuries until the day they were received. So far as the record before us shows, his previous employment, though in and about the plant where his injuries were received, was not such as to acquaint him with the character of work he was doing and the immediate instrumentalities he was working with on that day. At about six o'clock in the morning of the day in question he was put to work in connection with loading and unloading objects which were lifted, carried and let down by a traveling crane. This crane consisted of a bridge-like structure extending across a building, and, by trucks at its ends, resting on rails such as constitute the track on a railroad, one rail being on each side of the building, and the bridge-like structure, the crane, being so placed that it could be run on the rails from one end to the other of the building. On this crane was what is called in the record a "traveler," which is described as a contrivance so placed that it could run lengthwise of the crane, so that by means of the crane and its traveler objects could be picked up in any part of the building and taken to any other part thereof. The objects were picked up and carried by means of chains with hooks at the ends, the chains being wound about some part of the object it was desired to lift and the hooks simply slipped over the chains, while, when the object was to be let down, the hooks were pulled or released from the chains they had been slipped over. It was the duty of deceased on the day in question to hook and unhook the chains to and from these objects; and after he had thus been engaged from about six in the morning until between three and

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four o'clock in the afternoon, and at a time two trucks, each weighing between four and five hundred pounds, were suspended over him, one of the hooks slipped from the chain over which it had been placed, and, as a necessary result, one of the trucks fell. In its fall it hit Royston and inflicted such injuries that he died therefrom the third day thereafter.

The declaration charges that "the hook whereby said chain was fastened to said load, being insufficient in size and strength and unfit for the purpose intended and the work required, gave way, straightened, slipped or became detached from its fastenings"; that it was "a small, weak, unfit, unsafe and defective hook and chain, wholly insufficient to carry the weight required, and entirely inadequate for the work intended, and that the defendants knew, or should, in the exercise of due care and caution, have known of the defective, unfit and unsafe condition of the said appliances, all of which were unknown to the plaintiff's intestate, and could not have been known to him in the exercise of due care and caution for his own safety"; and charges further that the defendants were guilty of negligence in taking deceased from a safe place to work and placing him in an unsafe and dangerous place without warning and instructing him as to the dangers. But no evidence whatever was offered as to whether deceased was given any instructions as to the work he was put to doing on the day he was injured; and, as to whether or not he was familiar or unfamiliar with that work the evidence is meager, but there is some evidence to the effect that he did the work in a manner indicating that he was inexperienced. Further, as already stated, the evidence is to the effect that he had not done any of that work preceding that day.

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As to the alleged defective and insufficient hooks, the evidence is that the particular hook in question, and others of the same character, had been used to lift structures as heavy as the one dropped, and other structures weighing as much as a thousand pounds, and that it had never given way or proved insufficient except that on the day before deceased was injured a truck dropped which was being held by the particular hook in question, and that on that occurring the hook was at once taken to the shop and "fixed," as expressed by one of the witnesses. There is no evidence as to who did the fixing, whether a competent smith or otherwise, nor as to what was done in the process of fixing, nor is there any evidence as to what defect, if any, was discovered in it that caused it to give way and let the truck drop on the day before. There is considerable evidence, however, as to the condition of the hook just after the truck dropped which struck and injured deceased. As expressed by one of the witnesses, the hook then "looked like it had straightened," but was not "plumb straight." One witness says that immediately after the accident "it was straightened out some," while the motorman, the man in charge of the movements of the crane and traveler, says that he was looking at the hook when it began to give way, and his expression is that the hook slipped and the truck fell, and that after the accident the hook was "straightened to some extent." The hook in question, or one that the witnesses say is very much like it, and which the evidence indicates is the one in question, together with another hook which it is claimed is the one used with it, were sent up with the record in this case, and an examination of the two hooks shows that one of them is plainly not so much bent toward the point as the other, but that neither is of the regular fishhook pattern; that, on the contrary, both are somewhat straight

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toward the point, but that they are equally bent back at the place where the bend begins and on up to where they have passed the point of being at an angle slightly less than a right angle with that portion fastened to the chains; and it is explained by the witnesses, and not contradicted, that because of the character of some of the loads they were used to handle they were intentionally not made on the regular fishhook fashion.

None of the witnesses show or indicate whether the hook in question straightened somewhat under the load of the trucks which fell on and injured young Royston, or whether it was straightened before that time; but from all the evidence we think it clearly inferable, especially as the hook was fixed on the day before, and as it straightened somewhat on the next day, that the straightening must have occurred under the weight of the load, and that the truck was caused to fall because of such straightening. In fact, taking all of the testimony, we think this the only legitimate conclusion to be drawn from it.

One other matter of considerable controversy in the evidence is whether deceased was at the place necessary for him to be to do his work at the time injured, or whether he had unnecessarily placed himself under the trucks and thereby negligently exposed himself to danger. There is some evidence indicating that he was at the proper place to do his work, being two or three feet away from where the objects were to be let down. So that we think it cannot be said as a matter of law that deceased was improperly and unnecessarily exposing himself to danger, and that for that reason no recovery could be had.

In the view we take of the case, however, the one serious question is whether or not, under the evidence, a case was made out to go to the jury as to the negligence of the Lenoir Car Works in failing to furnish a sufficient

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hook. On this question it appears, under the authorities, that the falling of the truck on the previous day was notice to defendant car works of such defect or insufficiency as to charge it with responsibility if no steps had been taken to remedy the conditions (4 Labatt's Master & Servant, art. 100); but, as already indicated, the evidence discloses that when the object fell on the preceding day the hook and chain were promptly sent to the shop, where the hook was "fixed." In having the hook "fixed" the employer, of course, did its duty in the matter of acting on the notice of a defective appliance furnished by the falling of the object on the previous day; but having sent the appliances to the shop where the defect was repaired, the next question that arises is, was it the duty of the employer to inspect the hook after repaired, that it might see and know that it was rendered sufficient for the purpose for which it was being used. On this question it is said in 3 Labatt on Master & Servant (2nd Ed.), sec. 1009, "There is complete unanimity as to the doctrine that the degree of care which the law exacts from a master in respect to the maintenance of his instrumentalities in a safe condition is precisely the same as that which he is required to exercise in furnishing them."

Then, relative to the duty of the master in purchasing or furnishing instrumentalities, in the same volume, and at Sec. 1055, it is said:

"Negligence is sometimes inferable from the fact that the purchase or procurement otherwise of the instrumentality was carried out in a careless manner. But, in the absence of some special feature of this sort, the extent of the master's responsibility in cases of this type is necessarily determined with reference to the principle that he may rely in some degree upon the assumption that the parties who supplied an instrumentality exercised ordinary dili-

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gence in seeing that it was fit for use. All the authorities are agreed that the fact of the appliance being of an approved pattern, and having been bought from a reputable maker, is at least *prima facie* evidence that the defendant was not negligent in requiring his servant to use it. But most of the cases go much further than this, holding that such facts are conclusive in the master's favor in the absence of some circumstance which would put a prudent man upon inquiry at the time of the purchase or afterwards."

Applying these principles, and bearing in mind that as simple an instrumentality as a hook, such as is involved in this case, would not require that degree of care that complicated machinery would require, and bearing in mind that the master is not an insurer of the safety of his servants, but is required to use only that degree of diligence to avoid injury to the servant described by the term ordinary care, we think the Lenoir Car Works might probably be held in the instant case to have discharged its full duty when it sent to the shop the instrument in question and had it repaired or fixed, and that with the right to rely "in some degree" upon the assumption that the parties supplying or fixing it exercised ordinary diligence in seeing that it was fit for use, it was probably not incumbent on the employer to affirmatively show that the one doing the repairing was a reputable or competent one to do it. What the duties of the employer would be where the machinery was more complicated we do not pretend to say.

But some of the authorities go to the extent of holding that it is the duty of the master to inspect machinery after it is repaired, stating the rule without qualification. Such is the rule stated in 4 Thompson's Commentaries on Negligence, in the fourth volume, sec. 3788, in the following language:

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"The duty of a master to furnish reasonably safe premises, machinery, tools and appliances, with or about which his servants are to work, necessarily implies and includes the duty of making a reasonable inspection of such premises, machinery, tools and appliances after they have become defective and have been repaired, to the end of seeing that the reparation makes them reasonably safe and sufficient."

And suppose we apply this rigid rule to as simple an instrumentality as a hook, still there is no evidence that an inspection would have disclosed any defect; and this brings us to the consideration of another rule of law stated in 4 Thompson on Negligence, sec. 3803, in the following language:

"BURDEN OF PROOF IN ACTIONS PREDICATED UPON FAILURE TO MAKE PROPER INSPECTIONS.—Here, as elsewhere, the plaintiff is bound to make out his case; and in order to do this he must show that reasonably careful inspections were not made, and at reasonable intervals; and that if such inspections had been made, they would have disclosed the defect which led to the injury in time to permit of its reparation in the exercise of reasonable care."

Our own case of *Railroad v. Lindamood*, 3 Cates, 457, recognizes the soundness of this rule. In that case, quoting approvingly from Wood on Master and Servant, it is said: "The mere fact that the machinery proves defective, and that the injury results therefrom, does not fix the master's liability. *Prima facie*, it is presumed that the master has discharged his duty to the servant, and that he was not at fault. Therefore the servant must overcome this presumption by proof of fault on the master's part, either by showing that he knew or ought to have known of the defects complained of. . . . The burden of proving negli-

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gence on the part of the master is upon the servant; and he is bound to show that the injury arose from defects known to the master, or which he would have known by the exercise of ordinary care, or that he has failed to observe precautions essential to the protection of the servant, which ordinary prudence would have suggested.

“Again, at section 382, the same author (Wood) says: ‘The servant seeking recovery for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on his part. And he is met by two presumptions, both of which he must overcome in order to entitle him to recovery: First, that the master has discharged his duty to him, by providing suitable instrumentalities for his business, and in keeping them in condition; and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or, in the exercise of that ordinary care which he is bound to observe, he would have known it.’ ”

In the same case of *Railroad v. Lindamood*, referring to the case of *Sack v. Delose*, 137 Ill., 129, 27 N. E., 62, where an employe had been injured in attempting to stop a loaded car by the use of a brake which gave way, it was said: “In other words, the contention was that failure to inspect threw on the appellees the burden of showing the brake apparatus was properly constructed, and that there was no defect in it that an inspection would have disclosed. To this, however, the Court replied in these words: ‘This imposes the burden on the wrong party, and compels the defendant to prove that the injury did not result from his negligence. The proposition goes upon an unwarrantable assumption, to wit, that the inspection would have disclosed the defective condition of the brake. That is an affirma-

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tive proposition to be shown by the evidence, and the burden of proving it rests upon him who asserts it. If plaintiff had shown that the fault in the brake was in fact known to appellees' brakeman or car inspector, but unknown to himself, he would have made out his case, and so, too, he would have made his case, had he shown that the defect was of such a nature that it would have been known to them if they had exercised due care. No defect is latent which an inspection will disclose; hence appellees would be charged with knowing what an inspection would inform them. But before a Court and jury can say that their negligence to inspect the car was the cause of plaintiff's injury, it must be shown by the evidence that the fault or defect in the appliance was one which a proper inspection would have made known to him."

Applying these principles, there can be no recovery for any defect in the hook which caused it to straighten under the load for the reason that, if it be conceded it was the duty of the employer to inspect it after it was fixed and returned from the shop, and that there was no inspection, still there was absolutely no evidence offered below even tending to show that an inspection would have disclosed any defect.

But we are of the opinion that the rule requiring inspection could, in any event, apply only in case the hook unbent at the time the object fell. We are of opinion that the rule requiring inspection by the master could not apply if the hook was already somewhat straightened before it slipped loose and let the object fall. This in our opinion results for the reason that if it was in a somewhat straightened condition when returned from the shop the rule applicable to simple tools would have to apply, a rule applied by our Supreme Court to a defective ladder in the case of *Silvey v. Drill Co.*, 1 Thompson, 675, and a rule which

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has been applied by some Courts to hooks, as is pointed out in 3 Labatt on Master and Servant (2nd Ed.), pages 2481 to 2483.

One of the cases so holding is that of *Olson v. Dougherty Lumber Co.*, 102 Wis., 264. In that case an employe was engaged in moving certain timbers with an iron hook which was not sufficiently curved at the hook end, and was blunt. There, referring to the suggestion that there was actionable negligence in furnishing such a hook, it was said:

“Some suggestion is made that the accident may be attributed to actionable negligence in respect to the character of the hook that was furnished plaintiff; that if it had been some longer, or the hook end had been curved instead of straight, and not been so blunt, the accident would not have occurred. The answer to that is that the hook was one of those simple contrivances, so easy of comprehension, as to all the dangers of its use, by any person of ordinary intelligence, even if it were defective in the respects suggested, that actionable negligence of the employer cannot be based on the fact of its being furnished to the employe for use in the performance of his work. In such circumstances, it is presumed that reasonable attention by the employe to those matters which are open, obvious, and easily comprehended by any ordinary person of mature years, will disclose to the employe all the dangers of using the defective contrivance, and he is therefore conclusively presumed to have assumed such dangers as a part of his contract of employment.”

True, there are some cases holding that hooks do not come under the category of simple tools, among which are the well considered cases of *Williams v. Gabbutt Lumber Co.*, 132 Ga., 221, and *Longspre v. Big Blackfoot Milling*

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Co., 38 Montana, 99. These cases and others that might be cited show, however, that the exemption from the duty of inspecting and keeping in repair because of the simple-tools doctrine is not an absolute one as applied to any particular tool, but that each case must stand on its own facts, so that in one case a given tool might be held a simple tool within the rule of exemption, while in another the same tool might be held to not fall in the rule. In the Georgia case referred to, a very able and exhaustive opinion by Judge Lumpkin, it appears that the servant who had been injured had had no occasion or opportunity to examine the tool there in question, a cant hook; he being engaged in a different department of work from that in which the cant hook was being used, and only being called to use it on special occasions when it was necessary for him to help load logs with it, and it appearing further in that case that the particular defect in that tool was discoverable only by a close inspection. It was there remarked by the Court that "no arbitrary and invariable rule can be laid down by which it can be declared that a master is relieved from the duty of inspecting certain specified tools, regardless of the circumstances of the case. Nor can a Court well undertake to make a catalogue of tools by name, and say that as to injuries caused by them there shall be an arbitrary exemption from liability on the part of the master. At last the duty of the master must necessarily to some extent depend, not merely upon the name of the tool, but also the circumstances under which it is furnished or kept for use, and under which it is used. The underlying principle, rather than the name of the tool is the important matter. . . . The application of the rule that it must appear that the master knew or ought to have known of the defect or danger, and that the servant injured did not know and had no equal means of knowing such fact, and by the

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exercise of ordinary care could not have known thereof, to the facts of the particular case under investigation will furnish a solution of the question of liability or non-liability. In the determination of each case, the nature, character, and simplicity or complexity of the tool is, of course, an important factor for consideration."

Applying these rules and principles, and remembering that in the instant case deceased was necessarily brought in immediate contact with the hook in question every time he hooked a load to the crane with it, or unhooked it from a load, he was necessarily required to see its condition, we are of opinion that if the hook was in a measure straightened when he was put to work, he was chargeable with knowledge of that condition and the danger of its slipping because thereof, and that the simple-tool doctrine would apply, which doctrine under all the authorities, relieves the master from the duty of inspecting. See 1 Bailey's Personal Injuries, page 554, and cases there cited.

The case of *Ritt v. True Tag Paint Co.*, 24 Pickle, 646, would appear to be contrary to our holding in this case with reference to the duty of the master to inspect a simple tool just after it is repaired, as in that case the simple tool, a ladder, had just been repaired, and yet the master was held liable for an injury occurring because of defects in it. A more careful reading of that case, however, shows that it is not in conflict with our holding. As expressly pointed out in that case the repairs were not made by the master or by his superintendent, but by a fellow workman of the injured party, so that, as the Court remarks, "There was a failure on the part of the master to make repairs." Further, in that case the repairs had apparently rendered the ladder safe, as is there pointed out, while in the case at bar, if the hook was somewhat straightened when deceased was put to work with it, it was not apparently safe,

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and it is only with reference to such condition that we think the simple-tool doctrine applies, if such condition existed. This Ritt case is distinguished in the later case of *Silver v. Drilling Co.*, 1 Thompson, 675.

So it is, for the two reasons indicated, viz: First, if the hook became somewhat straightened under the load and let it fall, it is not shown that an inspection by the master would have disclosed its weakness; and, second, if it was already somewhat straightened when deceased was put to work with it, the simple-tool doctrine applies, and the master was not under any obligation to inspect it, we are of opinion the trial Court committed no error in directing a verdict in favor of defendants, and his action is affirmed with costs.

LOUISVILLE & NASHVILLE RAILROAD CO. v. M. D. HALL
AND W. E. COOPER, ADMRS. ETC.

Affirmed and further remittitur suggested by the Supreme Court.

(*Knoxville*. September Term, 1915.)

1. EVIDENCE, CIRCUMSTANTIAL. *Findings based on, not reached by guess or speculation.*

Facts may be proven by circumstantial evidence in civil as in criminal cases, and a finding of facts based on such evidence cannot be said to be the result of speculation or guess.

2. INTOXICATION. *Does not exempt one from the duty of exercising due care, or excuse contributory negligence.*

One who has disabled himself by voluntarily becoming intoxicated, and sustains personal injuries while so disabled, is by the law held to the same degree of care and prudence for his

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own safety as if he were sober, so that his acts in so exposing himself to danger cannot be excused because of his intoxicated condition, but must be looked to and regarded as if he were sober.

FROM McMINN COUNTY.

Appeal from the Circuit Court of McMinn County.
SAM BROWN, Judge.

JAS. B. WRIGHT, CLEM J. JONES and JOHNSON & COX
for Plaintiff in Error..

D. C. YOUNG and EUGENE IVINS for Defendant in
Error.

MR. JUSTICE HUGHES delivered the opinion of the
Court.

M. D. HALL and W. E. Cooper, administrators of the estate of A. B. Cooper, deceased, brought this suit as such administrators in the Circuit Court of McMinn County against Louisville & Nashville Railroad Company, J. W. Gregory, G. W. Standifer and C. C. Lane, to recover damages for the alleged wrongful and negligent killing of their deceased intestate by running an engine and train of cars over him; and at a term of that Court held in August, 1914, obtained a verdict and judgment against the railroad company and Standifer and Lane for \$5,000.00. The verdict of the jury was in favor of Gregory. The case is now before this Court on the appeal of the three defendants against whom the verdict and judgment were had below.

At the conclusion of all the evidence a motion was made on behalf of all the defendants below for the direction of

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a verdict in their favor. The trial Court sustained that motion as to two of three counts of the declaration, but denied it as to the third, which is a count charging failure to observe the statutory precautions found in Shannon's Code, section 1574, sub-section 4, requiring that "Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." Complaint is made of the action of the Court in not sustaining the motion as to all counts, the contention being that there was no evidence to take the case to the jury on any count. To dispose of this contention it is necessary to make the following statement of facts:

A. B. Cooper was in Athens, Tennessee, on April 5, 1912, and while there voluntarily became intoxicated. His home was at Etowah, and the means of going from Athens to Etowah by railroad was first to Englewood, a distance of about eight miles, and there change cars for Etowah. Cooper, while still intoxicated, embarked on the train leaving Athens for Englewood about 5.15 in the afternoon. He had failed to procure a ticket, but when the conductor went to him on the train he at first claimed to have purchased one, evidently believing in his drunken condition that he had done so. He made a search for his ticket, but, of course, did not find it, and thereupon produced a little bag with some money in it, and asked the conductor to take his fare out of that, but this the conductor declined to do, claiming, according to some of the evidence, that he was not permitted to do so, and, after waiting with patience for some time, estimated by the conductor to be fifteen minutes, he told Cooper that he

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would have to put him off the train. So he had the train stopped, when Cooper arose and walked to the rear of the coach and got off. In getting off he fell to the ground, but, according to the testimony of several witnesses, arose about the time or just after the train had again started on its journey, and on arising got onto the railroad track and went staggering from side to side in the direction in which the train was going. That was about 5.30 o'clock in the afternoon, as the conductor estimates the time. Deceased was then within a little more than one mile of Englewood. Nothing further was seen of him, so far as is disclosed by the record, until about 6 o'clock on the next morning, when his remains were found on and about the track, some 1,970 feet from where he was put off, and in the direction of Englewood. The body was on the track, very much mangled, the head cut off and lying to one side of the track, and one of his arms severed from the body. The train that Cooper had gotten off of went on to Englewood and on to Tellico Plains and returned after night to Athens. It got back to Englewood on the return trip at about 8.17 o'clock the same evening, and to Athens at 8.43, so that it passed the point where the body was found some short time after 8.17.

No witness was offered who saw deceased from the time he was seen staggering on the railroad track in the direction of Englewood just after being put off the train, until his body was found at about 6 o'clock next morning; and the contention of plaintiffs in error is that there was no evidence offered on the trial of the case below from which a jury could find that he was on the track in front of the returning train at the time he was run over, and that there was no evidence of any failure to observe any of the statutory precautions in running over deceased; the contention being that it is just as probable that he attempted

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to catch the passing train and was drawn under it, as that he was on the railroad track in front of the train. However, certain facts are disclosed which are relied on by defendants in error as sufficient to take the case to the jury on the theory that deceased was on the track, and therefore should have been seen by a proper observance of the statutes in question, but that because of the failure to properly observe the statutes he was not seen, and was therefore run over. The facts relied on as sufficient to take the case to the jury are these: At a point about 1,970 feet in the direction of Englewood from where deceased was put off the train, there was found on the next morning a pipe such as deceased is shown to have had at Athens on the day preceding his death, and which one of the witnesses in a qualified way says was Cooper's pipe; and in addition to the pipe there were found four or five matches which had been struck, and at the same place were found indications that someone had spit several times, and, as some of the witnesses testify, there were indications that someone had been sitting at that place. There were also just a few feet from that point, spoken of by one witness as being two or three crossties therefrom, and in the direction of Athens, some marks or tracks in the dirt between the crossties, spoken of by the witness as the tracks of a man, and referred to by all the witnesses who speak of the matter as being of such character as to indicate that the man or person who had made the tracks was being pushed or forced in the direction of Athens. Then some little distance still in the direction of Athens the head of Cooper was found lying on one side of the track, and then some little distance farther in the same direction Cooper's mangled body was found. The pipe when found had in it some tobacco, which, as one of the witnesses expresses it, looked as if it had been burned a little. The

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indications were that whoever had been at that point had spit oftener than once, some of the spittle being on the dirt, and some on the crossties. The pipe, the burned matches and the spittle were all about the middle of the track, according to the testimony of all the witnesses who speak of them. One of the witnesses speaks of the man's tracks as being made by the side of the foot, and several witnesses speak of them as indicating that the body of whoever had made them had been pushed or forced along the railroad track. Also, on the next morning there were found on the train that had passed the place where Cooper was killed the preceding night indications that it had run over some animal or person. The train was made up of an engine and tender and two passenger coaches. The chief signs that some animal or person had been run over were on the brake rigging on the rear of the front coach and on the front of the rear coach. On these brake riggings were found a piece of intestine as long as a man's arm and a piece of flesh; and, according to some of the testimony, there were significant signs on the tender and engine. Under the bottom of the tender, according to some testimony, were specks of flesh and blood; and one witness swears that there was some blood on one of the drive wheels of the engine. The signs clearly indicating where deceased was run over were in a shallow cut, and, although the soil in that vicinity is shown to have been of such character as that tracks were easily made in it, there were no signs of any person having approached the train from the embankments or the side of the track.

With all this testimony, and especially the testimony indicating that when Cooper was last seen on the railroad track he was in a drunken condition, and that the train that ran over him, as the evidence clearly indicates, passed about three hours later, and the evidence indicating that he

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had been setting or had taken a position on the railroad track where he had been striking matches to light his pipe, and had lighted it, and had there spit oftener than once, and that the train that struck him had pushed him along making the tracks in the dirt, we think clearly there was abundant evidence to take the case to the jury on the question of whether or not deceased had been run over while on the railroad track.

As to the observance of the statutory precautions by defendants, the engineer swears that he was on the lookout ahead, but saw no one, and, of course, no one being seen there was no occasion to ring the bell, blow the whistle, etc., as required by statute. Still as there was evidence sufficient to take the case to the jury on the question of deceased's being on the track, the testimony of the engineer that he was on the lookout and did not see him cannot and does not destroy the existence of the testimony indicating that he was on the track, and it was for the jury to find whether he was on the track or not, and if on it whether the statute was properly observed; and the cases relied on by plaintiff in error in support of their contention that it was just as probable that deceased was killed in an effort to catch on to the passing train as that he was killed by failure to observe the statute, therefore the case should not have gone to the jury, can have no application; or at least cannot be controlling, for the reason that in the cases relied on, and particularly the case of *Railroad v. Hawk*, 160 Federal, 348, and a manuscript opinion by the Supreme Court in the case of *Hackney v. Railroad*, decided at Knoxville in 1907, and *Murr v. Railroad* decided by the Court of Civil Appeals at Knoxville in 1910, there were no circumstances such as in the case at bar from which a jury could have found whether the persons injured were on the railroad track or whether they attempted

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to board the passing train. In other words, in those cases relied on by plaintiffs in error the facts and circumstances left the evidence as to whether the parties run over were on the track or attempted to board a passing train so uncertain that it was only a matter of conjecture as to what were the true facts, while in the case at bar the circumstances just referred to point rather clearly, it appears to this Court, to the fact that deceased was on the track and that he did not attempt to board the passing train. Certainly they were circumstances from which a jury might so find as a fact without any mere guessing as among the probabilities as to which of a number of ways the accident occurred. Of course, facts may be established by circumstantial evidence in civil as in criminal cases. *Walton v. Burchel*, 121 Tenn., 715. And when circumstances in evidence point to a conclusion of fact in such manner as to justify the finding of such fact it cannot be said that a jury acting on such circumstantial evidence and finding facts therefrom was left to guess or speculate as to probabilities.

Another contention is to the effect that the verdict of the jury was so excessive as to indicate passion, prejudice or caprice on the part of the jury, to consider which it is proper to make the following further statement of facts: Deceased was shown to be forty-two years old at the time of his death, to have been a man in good health and of good habits except that he had been for a number of years a rather heavy drinker. It appears, however, that for something like seven years before his death he had not been under the influence of intoxicants so much as preceding that time. That is, he had married about seven years before his death and had not indulged in the habit of drinking so much after his marriage as before. Yet after his marriage he had kept up the habit of getting on what the

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witnesses call "sprees," and was on one of these at the time he was killed. He is shown to have been a kind husband and father, and to have provided well for his family, considering his station in life. He owned his own home and some other realty, the whole of his realty being worth about \$3,750.00. He is shown also to have had some personal property at the time of his death, but that appears to have all been taken after his death to pay his debts. Now, it is said by counsel for defendants in error that \$5,000.00 as compensation for the killing of such a man is wholly inadequate, and that but for the fact that he was guilty of contributory negligence in being on the railroad track a much larger recovery should have been had, and that the jury made all allowances for that negligence on his part. On the other hand it is insisted by counsel for the railroad company that, considering the gross negligence of the deceased, \$5,000.00 is grossly in excess of what should have been allowed. In fact, it is insisted by counsel for the plaintiff in error that only nominal damages should be allowed.

Disposing first of the contention that nominal damages only should be allowed, we content ourselves by referring to the case of *Railroad v. Brinkley*, 127 Tenn., 77, where the law is expressly settled otherwise. The holding in the case of *Railroad v. Abbott*, to the effect that nominal damages only should be allowed in such cases as this, which is relied on by counsel for plaintiff in error, having been overruled in the *Brinkley* case, of course it is the duty of this Court to follow the last expression of our Supreme Court, and the contention as to nominal damages will not be further considered.

The real question for consideration at this point is what effect should the fact that deceased was intoxicated have on the amount of recovery. On that question we have no

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direct expression of our Supreme Court, so far as this Court knows, but we have numerous cases holding that voluntary drunkenness, even to the point of temporary insanity, is no excuse for crime, all of which cases are reviewed in the case of *Atkins v. State*, 119 Tenn., 458. Other States, however, have held directly on the question of the effect of contributory negligence on the part of the one who seeks in a civil action to recover for personal injuries where the person injured had voluntarily become intoxicated at the time the injuries were received, which holdings are in point here.

In *Welty v. Railroad*, 105 Ind., 55, it was said:

“Drunkenness is no excuse for crime, and if it cannot be used as an excuse by one accused of crime it is not conceivable that it can be used where only property rights are involved to avert consequences which usually result from a wrongful or negligent act. *Goodwin v. State*, 96 Ind., 550, and cases cited. In *Bloom v. Franklin Life Ins. Co.*, 97 Ind., 478, (49 Am. Rep., 469), it was held that the representative of a man who met his death while committing an assault and battery, could not urge as a cause for averting a forfeiture of a policy of life insurance that the insured was drunk at the time he committed the unlawful act. Judge Cooley says: ‘The fact that a tort was committed while a defendant was intoxicated is no excuse whatever.’ Cooley Torts, 114. In another treatise it is said: ‘Intoxication should not benefit any man.’ Shear. & Redf., neg., section 29, n.

“The adjudged cases agree that intoxication will not excuse a man from the exercise of the care and diligence required of all citizens: *Yarnell v. St. Louis, Etc., R. W. Co.*, 75 Mo., 575; *Fitzgerald v. Western*, 52 Wis., 354; *Denman v. St. Paul, Etc., R. R. Co.*, 26 Minn., 357;

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Beach Cont. Neg., 205; Thompson, Neg., 430. The principle deducible from these authorities is, that voluntary drunkenness is not available to avert the usual and natural consequences flowing from a man's act, and from this deduction flows the ultimate conclusion that a drunken man will be held to the same measure of responsibility as a sober one, and his actions judged by the same standard, except in cases of contract. . . . The same rule applies to him drunk as to him sober. If it were otherwise, a premium would be put on drunkenness, and that the law has never done, and, it is not hazardous to affirm, never will do."

In *Vizacchero v. Rhode Island Co.*, 26 R. I., 392, 69 L. R. A., 188, a street car had at night run on and killed one in an intoxicated condition on the track, as some evidence indicated, and suit was brought to recover damages. In that case it was said:

"If the plaintiff's intestate had impaired his ability to take care of himself by getting intoxicated, that fact in no wise affects the case. Intoxication does not relieve a man from the degree of care required of a sober man in the same circumstances. *Chicago City R. R. Co. v. Lewis*, 5 Ill. App., 242; *Bageard v. Consolidated Traction Co.*, 64 N. J. L., 316, 49 L. R. A., 424, 81 Am. St. Rep., 498, 45 Atl., 620. In *Bugbee v. Union R. Co.* (R. I.), 59 Atl., 165, the plaintiff was walking upon the track, intoxicated, when he was struck by an electric car, and the Court considered him culpably negligent."

In *Price v. Railroad*, 84 Md., 506, 36 L. R. A., 213, in speaking of the contributory negligence of one who while on a railroad track drunk to the point of unconsciousness, had received injuries, it was said:

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"A learned writer upon the subject of contributory negligence has said that 'drunkenness is a wholly self-imposed disability, and, in consequence, is not to be regarded with that kindness and indulgence which we instinctively concede to blindness or deafness or any other physical infirmity. Trespassers go at their peril. That is a settled law. Much more is it just to hold that they make themselves drunk at their peril. Disabilities, moreover, of any kind, are to be a shield, and never a sword. It would be a strange rule of law that regarded a certain course of conduct negligent and blameworthy upon the part of a sober man, but that held the same conduct on the part of the same man, when intoxicated, venial and excusable. Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures *cum periculis*. When they make themselves drunk, and in that helpless condition wander upon the premises of sober men, and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence.' Beach, Contrib. Neg., 2d Ed., 391."

In *Smith v. Railroad*, 114 N. C., 728, 25 L. R. A., 287, the second division of the syllabus, as the case is reported in 25 L. R. A., expressed the holding of the Court in the following language:

"One who has voluntarily disabled himself by reason of intoxication is held to the same degree of care and prudence for his safety that is required of a sober person."

It can be here observed that the case of *Smith v. Railroad* contains a valuable review of the authorities on the question.

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Without further quoting from or referring to the cases on the question, we can say that the holdings all appear to be to the same effect as those just quoted from, many of which will be found referred to in 2 Woolen & Thornton on Intoxicating Liquors, section 1185.

So it is, the contributory negligence of A. B. Cooper, deceased, must be looked to and regarded just as if he had been duly sober and in possession of all his faculties when run over and killed on the track of plaintiff in error. Now, looking at his negligence just as if he had been at the time duly sober, it must be admitted by every one that that negligence was of the very grossest character. For the purpose of seeing it in all its grossness suppose one in full possession of all his faculties should go deliberately and sit down on a railroad track between the rails and keep his position there until run over by a train. Clearly such would be almost suicide, and but for the statutes which govern the question no liability could attach.

Then what should be the amount of recovery for the death of one who has been guilty of such gross contributory negligence, and as a result was killed? Certainly it cannot be measured by the value of his life, because as held in *Railroad v. Brinkley*, 127 Tenn., 77, damages must be mitigated in view of the degree or extent of the contributory negligence of the injured party. We are of the opinion that \$5,000.00 is so excessive as to indicate passion or prejudice on the part of the jury when the extent of the contributory negligence of the injured party is considered, and we therefore suggest a remittitur of \$1,500.00, leaving a recovery of \$3,500.00. If this remittitur is accepted a judgment will be entered here for \$3,500.00, otherwise the case will be reversed and remanded because of the excessiveness of the verdict and judgment. If the remittitur is accepted plaintiff in error will be taxed with

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the costs, if not the costs will be taxed to defendants in error.

(The Supreme Court affirmed this holding, with the suggestion of a further remittitur of \$2,500.00, cutting the judgment to \$1,000.00, which was accepted.)

KNOXVILLE RAILWAY & LIGHT CO. V. R. M. JOHNSON.

Affirmed by Supreme Court, at Knoxville, 1915.

1. **ELECTRIC RAILROAD DEVOTED EXCLUSIVELY TO HAULING PASSENGERS IN TERRITORY ADJACENT TO CITY. *Not an additional burden.***

An electric railway extending beyond the city limits and into the country along a county highway or turnpike and devoted exclusively to hauling passengers is not an additional burden upon the fee of adjacent landowners. The question as to whether an interurban railroad devoted to the hauling of freight also is an additional burden is reserved.

2. **SAME. *Change of grade.***

But in the case of an electric passenger railway along a county road an additional burden is cast if there is a material change in the grade consequent upon the construction of the railway along residence frontages.

3. **EMINENT DOMAIN. *Change of grade of highway. Estoppel.***

An owner of land whose easement of ingress and egress is taken away by a change in the grade of a highway is entitled to damages unless he has estopped himself to claim the same. And the general rule is that a landowner who petitions the authorities for such change of grade is estopped to claim consequential damages.

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4. PRACTICE. *Judicial estoppel. Estoppel arising during progress of a cause. Defense.*

Where the plaintiff in a cause has during the whole of a trial treated a certain defense, *i. e.*, estoppel, as arising under the pleadings and permits the Circuit Judge to assume it as an issue and submit it to the jury, it is too late for the losing plaintiff to insist in the Appellate Court that the estoppel was not an issue because not pleaded.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

SHIELDS & CATES and CHAS. H. SMITH for Plaintiff in Error.

GREEN, WEBB & TATE for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS suit was originally instituted by Johnson against Knox County and the Railway & Light Company to recover damages upon the theory that the county had authorized a change of grade in a public road in front of his property and on the further theory that the Railway Company had appropriated part of his lands and had placed additional burdens upon his easement in the highway by building and operating thereon a street car system. The case was subsequently dismissed as to Knox County and was finally tried as a suit of Johnson's heirs at law, he having died before termination of the suit.

The cause was tried by the Court and a jury, with the result that a verdict of \$500 was returned. It is stated

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that \$150 was given for the land taken and \$350 for incidental damages. Judgment for these sums was pronounced. The company excepted and prayed and perfected its appeal and is here assigning four errors. These need not be specifically treated, as they raise questions which can be disposed of conjointly and summarily.

We have carefully examined the record and have reached the conclusion that a reversal and remandment for new trial is inevitable. The primary contention of the Railway Company is that the lower Court throughout took the position that the street railway was an additional burden upon the fee of Johnson and so instructed the jury, and that by so doing grievous error was committed. We are of opinion that the learned trial Judge was in error in stating unqualifiedly that the building of the railway was an additional burden entitling Johnson to a recovery. While not so expressly decided in Tennessee as to country roads, we are persuaded that this conclusion was foreshadowed or virtually settled by the following cases: *Smith v. Railroad*, 3 Pick., 626; *Doyle v. Railway*, 4 Pick., 747; *Railway Co. v. Telephone Co.*, 9 Pick., 492; *Frazier v. Telephone Co.*, 7 Cates, 416.

It is strenuously insisted by learned counsel for Johnson that all these cases dealt with tracks laid upon city streets and did not have reference to railways extending along rural roads. It is well to have the facts of this case briefly stated. The road along which the tracks of plaintiff in error were laid was a country turnpike running to the city limits. The extension that was made upon it was for about a mile from the city limits and was constructed and used exclusively for passenger traffic and as a part of the city system. In the Doyle case the Court in speaking of adjacent owners referred indiscriminately to abutters upon streets and highways, evidently meaning public roads by

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the latter term. So that the decision in that case is persuasive at least that the Courts of this State are committed to the doctrine that a street railway is not an additional charge.

It were useless to cite or quote decisions to the effect that street railways are not additional burdens upon city streets. That is conceded. We are unable to ascertain any juridical or substantial reason for any difference of treatment whether the railway is on a street or a public thoroughfare owned by the county. They were both designed for travel and for all reasonable and contemplated modes of travel and usage. There is no just ground for asserting that adjacent owners in towns and cities must tolerate without compensation this increased facility of travel while denying that residents along country roads must be put in the same plight.

Electric or street railways cannot be compared to steam railroads, nor in our judgment treated as such. The latter are noisy, heavy, lengthy, fright-producing, and are calculated to impair very much the use and enjoyment of property immediately adjacent. But with respect to electric railways carrying passengers exclusively it may be said that there is an enhancement of enjoyment and in no sense an annoyance. Hence, the logic of holding that they are not an additional charge, but can clearly be held to come within the easements acquired by the public from adjacent landowners at the time of the acquisition of the highway. We are satisfied after thorough examination that under the peculiar facts of the present case the Court was in error in assuming and stating that the placing of the car tracks on the highway was an additional burden. See 15 Cyc., 679; *Green v. Railway*, 78 Md., 294; 44 Am. St. Rep., 288; *Railroad v. Mills*, 85 Mich., 634. See also note in 36 L. R. A. (N. S.), 673, and *Coldwell v. Con-*

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necticut Co., 40 L. R. A. (N. S.), 258. It must be remembered that we are not now deciding the question as to whether interurban railways carrying both freight and passengers are additional charges. That is a question that will be dealt with when it shall have arisen.

But it is insisted that the rule to the effect that the railway is not an additional charge does not obtain when there has been a change of grade because of the taking. This is a well-known and sound exception to the rule, and has its basis in the fact that when a change of grade is necessitated the adjacent owner is subjected to peculiar inconveniences not contemplated at the time of original granting of the highway. This situation is implied by section 2403 of Shannon's Code, wherein the rights and powers of such companies are prescribed. It will be observed upon reading the statute that legislative permission to construct such a railway is conditioned upon or has reference to constructions upon the grade in existence at the time the railway is built. All the decisions referred to and quite a number in addition also make this distinction. There was a change of grade in front of Johnson's house, but it is to be determined later whether this afforded him an unimpeded right of action for damages.

Assuming that there was a public road in front of Johnson's property, there was a material change in grade such as destroyed his easement of ingress and egress. Upon any view that may be taken of the additional burden doctrine, the owner would ordinarily be entitled to recompense because of the peculiar damages thus suffered by him: *Railroad v. Bingham*, 3 Pick., 522; *Railroad v. Everle*, 100 Ind., 542. Indeed, this right to damages because of peculiar inconvenience resulting from putting additional instrumentalities of travel in front of property in such a way as to destroy the easement of ingress and egress is

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recognized in the Frazier case. See also 25 L. R. A. (N. S.), 1268, and 15 Cyc., 677.

But plaintiff in error undertakes to meet this contention of Johnson by urging that he estopped himself to claim compensation. It is stated that he had petitioned the County Court of Knox to open this road and reduce the grade to five per cent (that grade which was adopted), and that by so doing he had waived his claim to damages or estopped himself to assert any right thereto. This was the view adopted by the Circuit Judge; and but for his misconception that a street railway was an additional burden, he would necessarily have decided the controversy in favor of the company and denied Johnson any recovery. It is this mistake which renders unavoidable a reversal. The Court was of opinion that Johnson had waived his right of action consequent upon the change of grade, and that his only right of action was against the Railway Company for increasing the burdens upon his fee by laying a track on the turnpike.

Defendant in error insists that he cannot be repelled on the ground of estoppel, for the reason that no such defense was pleaded and therefore cannot be relied upon. Here again is an anomolous situation. It is undoubtedly true that an estoppel should be specially pleaded and it is true that plaintiff in error had no such formal plea. But it is disclosed by the record that able counsel representing Johnson expressly agreed that Johnson's petition to the county might be read to the jury, and he permitted the Court and opposite counsel to treat an estoppel as properly raised and the subject-matter of elaborate instructions to the jury. We have reached the conclusion that by so doing defendant in error is himself estopped to assert that the Railway Company did not rely upon the defense of estoppel in the lower Court. *Smith v. Fox*, 42 N. Y. Supp., 20. The

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tendency, and a beneficent one, is to extend the doctrine of judicial estoppel with respect to matters not appertaining to a plaintiff's case. It seems to be that no course of conduct pursued by the parties can import into a declaration a set of material facts not embraced in its allegations. The rule seems to be different when it comes to determining what was raised by the pleas of the defendant.

We have assumed without determining that Johnson had estopped himself to claim damages, and we feel constrained to take the view that defendant in error cannot assail this assumption here and insist that substantial justice had been reached. For if we were to decide as a matter of law that Johnson was estopped the controversy would have to be determined in favor of plaintiff in error. It seems to be well established that a landowner can, by urging the authorities to make a change in grade, estop himself to claim damages: 15 Cyc., 804; Elliott on Roads and Streets, Hermann on Estoppel, 564, and cases cited. But to what extent this estoppel applies to Johnson and whether the Railway Company can claim the benefit of it as well as the county are questions which we shall not elaborate because not distinctly arising at this time. Nor do we discuss the consequences resulting upon the finding that the supposed road was non-existent, as is urged by the Railway Company.

It is earnestly insisted by Johnson that the company actually took some of his land lying beyond the limits of the road that it should be required to pay for this at least. This strikes us as possessing merit. But we are unable to determine how much was actually taken, nor its value, and this statement makes it clear that we cannot affirm the judgment upon the assumption that justice has been done. These matters cannot be cleared up other than by new trial.

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We quite agree that if Knox County could be held for changing the grade, then the Railway Company might be likewise charged. But whether it can be urged that because of the non-liability of the county the Railway Company must also go quit is not clear for the reason that we cannot now determine whether the county or the Railway Company changed the grades; nor can we determine that this was or was not a public highway. It is for these and other reasons that we direct a new trial and suggest a more specific finding of the facts. Defendant in error will pay the costs of this Court.

**C. S. JACKSON v. MOUNT PLEASANT COMBINATION CASH
STORE.**

Writ of certiorari denied by Supreme Court.

(*Nashville*. December Term, 1914.)

1. **APPEAL.** *Not dismissed because bill of exceptions not filed in time or insufficient.*

The fact that a bill of exceptions was not filed within the proper time, or that it contains matter not properly there, gives no ground for dismissing an appeal as the case may be reviewed on the technical record.

2. **BILL OF EXCEPTIONS.** *Time granted for making out and filing not extended by continuance of term.*

Where time is granted by the trial Court for making out and filing the bill of exceptions the continuance of the Court beyond that time will not operate to extend the time to make out and file the bill of exceptions.

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3. SAME. *Must be made out and filed during term or within time thereafter allowed, to be looked to for any purpose, even to retax costs.*

The rule that a bill of exceptions must be made out, signed by the trial Court, and filed during the term of Court at which the evidence was heard or other matter occurred it is necessary to preserve by bill of exceptions, was not changed by the legislation providing for trial Courts extending time not exceeding thirty days for preparing and filing bills of exceptions, and the legislation providing for the employment of stenographers and the incorporation of their notes in bill of exceptions; so matters occurring at one term of Court cannot be brought into the record by bill of exceptions made up at a succeeding term.

4. SAME. *Not to be treated as a finding of fact by, or the evidence of, the trial Court.*

Nor can a bill of exceptions not made out and filed in time be treated as a finding of fact by the trial Court, or the evidence of the trial Court as to what occurred at a previous term.

5. SETTING UP EVIDENCE HEARD AT FORMER TERM. *Practice with reference to suggested.*

It is suggested that where evidence heard, on other matter occurring, at a former term has not been preserved by wayside bill of exceptions, and for any reason, as for the retaxation of costs, it is desired to thereafter bring it into the record such may be done by introducing in evidence the stenographer's notes or other available source of information, to show just what previously occurred, and then preserve that evidence by bill of exceptions.

FROM MAURY COUNTY.

Appealed in error from the Circuit Court of Maury County. W. B. TURNER, Judge.

PERCY CHANDLER for Plaintiff in Error.

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W. S. FLEMING for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS suit was brought in the Circuit Court of Maury County by E. L. Parker, W. A. Green and E. C. Searson, partners doing a mercantile business under the name and style of Mount Pleasant Combination Cash Store, against C. S. Jackson; the plaintiffs alleging in the declaration that they had rented from Jackson a building in which to conduct their mercantile business, and that there was an understanding and agreement that defendant was to at once put an addition to the building so as to enlarge its capacity; that they put their stock of merchandise in the building, and that thereafter defendant set about constructing the addition he had agreed to construct, and that in doing so, and as a result of the work he was doing, and because of the negligent manner of doing it, the building, on two separate occasions, fell or slid from its foundation and injured the goods of plaintiffs and otherwise caused them loss and damage. Issues were duly made up, and, after three successive trials to be hereinafter referred to more in detail, the case was finally disposed of in December, 1913; plaintiffs below, as a result of final disposition, getting a judgment against Jackson for \$100.00 and the costs. After that final disposition of the case, and after the term of the Court at which it was had had passed, and at the next term thereafter, defendant below moved the Court to retax the costs, setting out in his motion the items sought to be retaxed and the grounds on which he sought a retaxation. That motion was in part allowed and in part denied. From so much of the judgment as denied the full measure of relief sought defendant Jackson appealed to this Court, and here makes formal complaint. Plaintiff's appeal to this Court was prayed and granted on

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March 25, 1914, and it was recited in the order showing the prayer for, and the granting of, the appeal that "the Court allows defendant thirty days from this date within which to file his bill of exceptions." The bill of exceptions was in fact signed by the trial Court and filed on August 23, 1914. It attempts to preserve and make part of the record evidence of certain witnesses who had been examined and testified at the term of Court preceding that at which the appeal was prayed and granted, and time given to make out and file the bill of exceptions.

In this condition of the record the defendants in error made and duly filed in this Court before the case was reached for trial a motion asking the Court to dismiss the appeal on two grounds: First, that the bill of exceptions was not filed within the thirty days allowed by the Circuit Court; and, second, because the bill of exceptions has incorporated in it what purports to be the evidence of the witnesses given at a term of Court previous to that at which the case was finally disposed of, and at which the time was taken to prepare the bill of exceptions.

This motion must be disallowed for the reason that, even if the facts are as contended, that is if the bill of exceptions was not made out and filed within the proper time, and if it attempts to incorporate in it matters that cannot be so incorporated, still the case is here on appeal, and may be reviewed on the technical record, as is expressly held in the case of *Duane v. Richardson*, 22 Pickle, 80. In other words, as held in the case referred to, and as is necessarily so, the fact that a bill of exceptions has not been properly made out, or has not been filed within the proper time, in no way interferes with the rights of the parties to prosecute an appeal. Such matters simply operate against the bill of exceptions, but leave the balance of the record, known as the technical record, properly before this Court, and assignments may be based thereon.

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It is conceded by plaintiff in error that the bill of exceptions was in fact not filed within the thirty days allowed by the trial Court, but it is said that the extension of thirty days was not a limitation on the time within which it might be filed, and that if the bill of exceptions was made up during the term of the Court at which the time was granted it would still be in time, notwithstanding the time given by the order of the Court, and that, it appearing that it was made up and filed during that term of Court, such was in time under the law, in support of which contention the case of *Dunn v. State*, 19 Cates, 267, 276, is relied on. The case does not support the contention. In that case, and on page 276 of 19 Cates, it is pointed out that one of the periods during which a bill of exceptions may be lawfully filed is, to quote, "During the whole of the ordinary term of the Court at which the case is tried, if there be no order of that Court fixing a shorter period within the term;" and it is there further pointed out that a bill of exceptions must be filed "during such special period fixed by the Court within the ordinary term if thereby any such period fixed." Now, turning to the order of the Court fixing the time provided in the instant case for filing the bill of exceptions, it is seen that it is there recited that, "The Court allowed defendant thirty days from this date," etc., which, we think, was an absolute fixing of time whether it be called an extension or a limitation. But if in this view we are not correct, though we think there can be no question about it, the second ground for the motion to dismiss the appeal, while not sufficient for that purpose, points out a reason why the bill of exceptions cannot be looked to. That the effort in the bill of exceptions made up and filed in April, 1914, is to preserve matters that occurred at a former term of the Court is not questioned, and it is well settled that this cannot be done:

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Railroad v. Fort, 4 Cates, 432, 439-40, and cases there cited.

It is conceded by counsel for plaintiff in error that the ordinary rule is as laid down in the cases referred to, but it is earnestly argued that the rule should not be applied in a case like the one at bar where nothing was sought at the term at which the bill of exceptions was made up or the time given to make it up except a mere retaxation of costs, a matter which might in any case arise at a term subsequent to that at which the case was tried on its merits. We are unable to assent to this contention. All the reasons underlying the rule requiring bills of exceptions made up at the terms of the Court at which the matters occurred that it is desired to preserve by them apply to such situation as the one at bar just as in any other situation; the reasons being that the matters proper for a bill of exceptions should be preserved by being reduced to writing and filed in the case while they are fresh in the memory of Court and counsel. *McGavock v. Puryear*, 6 Cold., 34; *Steel v. Davis*, 5 Heisk., 75; *Eason v. State*, 6 Bax., 434; *Railroad v. Fort*, *supra*. Nor has it been the policy of the Courts to relax this rule because of the fact that evidence and other matters proper for bills of exceptions may be taken down in shorthand more readily than formerly, nor because of the fact that now, contrary to the practice formerly prevailing, Courts are permitted to extend time beyond the term, not exceeding thirty days, for preparing and filing bills of exceptions. This appears from the *Railroad-Fort* case, which was decided in 1903, after the passage of the Act providing for the extension of time in which to prepare and file bills of exceptions (Acts 1899, chapter 275), and after the passing of Acts 1887, chapter 217, making provisions for the employment of a stenographer and for incorporating the stenographer's notes in the bill

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of exceptions. As remarked in the case of *Dunn v. State*, 19 Cates, 267, 276, even when a motion for a new trial made at one term of Court is permitted to go over to another term, the time for preparing the bill of exceptions is not thereby extended from one term to the other for the reason that the matters proper to be put into the bill of exceptions, being mere matters of memory, styled "fluid materials" in the *Dunn* case, "remain no longer available." Of course, if they are not available after the term at which they occurred has passed and after the time within which to prepare the bill of exceptions that may have been allowed has passed, they cannot be thereafter in any way preserved as it is an impossibility to preserve that which is no longer available.

Nor can the bill of exceptions in the case at bar be treated as a finding of facts, as is suggested by counsel for plaintiff in error, for the reason that it is in truth not a finding of facts, and does not purport to be. Nor can the bill of exceptions be treated as the testimony of the trial Judge as to what had previously occurred, as is suggested. The trial Judge was not called on to testify and no opportunity was furnished adversary counsel to cross-examine him; and here it might be suggested that if in truth, as argued, there were stenographer's notes, or other means at hand for accurately obtaining just what had occurred at the preceding term and they had been offered in evidence and in that way an opportunity given to cross-examine or introduce other evidence on the question, no reason is seen why counsel might not in that way have gotten before the Court those things as evidence on the motion to retax costs, and then preserved them by bill of exceptions; so that the insistence that in such case as this the party desiring to preserve and take to an Appellate Court the facts bearing on the issue as to whether the costs should

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be retaxed or not is without remedy unless previous wayside bills of exceptions had been made up, appears to be without merit. Of course, it is not meant to suggest that evidence so brought into the record and preserved would serve all the purposes of a wayside bill of exceptions. Just what its full effect would be we do not mean to suggest.

For the reasons indicated we hold that while the motion to dismiss the appeal must be overruled, still, because of the matters set out as grounds for that motion, this Court cannot look to the bill of exceptions in the case, but is confined solely to the technical record; and, this being true, the relief now sought cannot be granted, as is admitted by counsel for plaintiff in error.

The judgment of the lower Court is affirmed, and plaintiff in error taxed with the costs of this proceeding.

Gray v. Kent.

JENNIE B. GRAY V. W. W. KENT, ET AL., RECEIVERS.

Affirmed by Supreme Court, at Knoxville, 1915.

1. **PRACTICE.** *When two trials and two bills of exceptions. Result when first trial free from error.*

Where a common law case has been twice tried resulting in verdict, the first of which is set aside by the trial Judge, and appeal taken to this Court, it is our duty to examine the transcript and bill of exceptions of the first trial before considering what transpired upon the second trial. And if the first trial be free from substantial error a judgment upon the first verdict will be directed.

2. **SAME.** *Rule when there is an assignment of no evidence to support verdict.*

In considering an assignment that there is no evidence to support a verdict this Court discards all evidence militating against the verdict and takes the strongest legitimate view of the favoring testimony.

3. **MASTER AND SERVANT.** *Burden of proof as to injury while in the service.*

The burden is upon an injured servant suing his master to prove by a preponderance that he was injured while in the service of his master and while performing in the course of his employment.

4. **SAME.** *Exception. Defense that servant had stepped aside.*

But if the master make an effort to avoid liability upon the ground that his servant at the time he was hurt had stepped aside from his employment or was beyond the scope of his employment, the burden is on him to so show.

5. **SAME.** *Injury after leaving working place.*

A railway employe who is injured while on his way to his meals and after permission to go cannot recover from his master for such injuries.

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6. EMPLOYERS' LIABILITY ACT. *Amendment of suit originally brought under State law so as to sue under Federal law. Statute of limitations.*

An amendment to a declaration which introduces in *hacce verba* the Federal Employers' Liability Act without the addition of any new facts does not introduce a new cause of action and hence the statute of limitations of two years will not prevent the carrying on of the suit as an action under the Federal statute.

FROM HAMILTON COUNTY.

Appeal in error from Circuit Court of Hamilton County.
NATHAN BACHMAN, Judge.

JOE V. WILLIAMS and TATUM & THATCH for Plaintiff
in Error.

COLEMAN & FRIERSON for Defendants in Error.

MR. JUSTICE MOORE delivered the opinion of the
Court.

THIS action was brought to recover damages for the negligent killing of plaintiff's husband, on the 23d of June, 1908, in Alton Park, a suburb town of the city of Chattanooga. There have been two trials of the cause, the first resulting in a verdict in favor of plaintiff for \$10,000.00, which, on motion of the defendants, was set aside by the trial Judge for error in his charge. Plaintiff excepted to the action of the trial Judge in setting aside the verdict and granting a new trial, and perfected and filed her way-side bill of exceptions. The case was again tried, when, on motion of the defendants, the trial Judge directed the jury to return its verdict in favor of the defendants, which was

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accordingly done. Thereupon plaintiff moved for a new trial and, her motion being overruled, has appealed in error to this Court.

The first assignments of error challenge the correctness of the action of the trial Judge in setting aside the verdict for \$10,000.00 and granting the defendants a new trial, and we will dispose of these assignments first.

When this case was first brought into the Circuit Court of Hamilton County, and the declaration then filed, it alleged common law negligence, and not a case of liability under the Employer's Liability Act, passed by Congress April 22, 1908, and amended April 5, 1910. The negligence averred in the declaration was the defective condition of the engine on which the deceased was riding at the time of his injury, and of the incompetency of the engineer in charge of it. It was averred that plaintiff was at work for the defendants at the time of his injury, as a brakeman on one of its trains, and sometimes acting as a switchman and extra conductor. In the original declaration, it is also charged that the defendants, as receivers, were operating and controlling the Chattanooga Southern Railway Company, a corporation operating a line of railroad in Chattanooga and Hamilton County, Tennessee, and extending into the State of Georgia and certain parts of the State of Alabama. One of its lines runs from a point known as Alton Park, a suburb of Chattanooga to the Union Depot in the city of Chattanooga. It is next averred that the deceased was ordered to throw a switch on one of the tracks so that its cars could come from Alton Park to Chattanooga, Tennessee, and in order to do so, it was necessary that he get on the tender and cross the train; that he stepped on the tender, or on the footboard thereof, and that the footboard was out of repair and loose, and the hand holds on the engine were improperly constructed

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and out of repair, both of which were dangerous, and which condition was not known to the deceased, and in complying with the orders given him, he attempted to walk across the footboard and across the train, and because of its defective condition and the defective condition of the hand holds on the tender, the deceased was caused to fall from the tender to the ground, and was run over by the engine. This is in substance and briefly, the material parts of the original declaration filed in this cause.

On the 29th of November, 1909, plaintiff's counsel filed an additional count to the declaration, containing in substance the same averments set out in the first declaration. The additional matter added in the additional count is, that the Chattanooga Southern Railway Company was organized and existing under the laws of the States of Georgia and Alabama, and that it owned and operated a railroad from the city of Chattanooga, Tennessee, into the States of Georgia and Alabama. It is then averred, as new matter, that the deceased, on the 23d of June, 1908, "Was working as a conductor on one of its passenger trains running from Gadsden, Alabama, to Chattanooga, Tennessee, and on that date he was ordered to leave his train when it reached Alton Park, and assist another crew in bringing a train from Alton Park to Chattanooga, Tennessee. The defective condition of the engine and tender used to take the train from Alton Park to Chattanooga, was substantially alleged in the additional count, as was in the original count of the declaration, and about the same averments were made as to how the deceased was injured as were set out in the original declaration. On the 1st of February, 1912, the additional count to the declaration, filed 29th of November, 1909, was amended so as to charge that, "At the time of his death, he and the defendants were engaged in operating a railroad between the States of Georgia,

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Tennessee, Alabama and other States, and the engineer in charge of said train of cars was negligent and unfit for the position he held, and this was known to the defendants, or should have been known to them, and after the said James Gray, who was the husband of plaintiff, and on whom she was dependent for support, had been negligently thrown down in front of the tender attached to the engine, and while his life was thus endangered, the engineer negligently pulled his body along in front of the tender about 125 feet, and if the engineer had not been deaf or negligent and unfit for his position, the life of James Gray could have been saved even after he was thrown down in front of the tender attached to said engine."

The effect of this last amendment to the additional count filed 29th of February, 1909, was to make out a case of liability under the Act of Congress called the Employer's Liability Act. Or, in other words, these two amendments operated to add an additional count to the original declaration, and to state a cause of action under the Employer's Liability Act. These amendments left the original declaration stating and charging a common law liability under the laws of Tennessee. We presume these amendments were made by plaintiff's learned counsel, in order to meet the proof as it was developed during the trial of the cause. The original declaration clearly states a cause of action under the common law of Tennessee, against the defendants on one of its lines of railroad, while they and the deceased were engaged in intra-state commerce in this State, while the additional count and the amendment thereto, make a case of liability under the Employer's Liability Act. Before the case was tried the first time, which was the 11th of September, 1912, the defendants had not filed an additional plea to the amendment made February 1st, 1912, and the case went to trial without any objection be-

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ing made by the defendants to the amendments, or any question raised thereon. Nor did they file any plea that the plaintiff could not prosecute her suit in her individual capacity under the Employer's Liability Act. The case was heard and the proof all introduced under the first count, that is, under the declaration as originally filed.

It is insisted by learned counsel for defendants that the proof heard during the first trial clearly shows that a case was made out showing liability under the Employer's Liability Act, that is, he insists that the proof is clear that the deceased and the defendant Railroad Company were engaged at the time of his injury and death, in an interstate transaction, that is, that he was switching or operating cars that had passed from another State into Tennessee, and had not yet reached their point of destination. Appellant's learned counsel equally as strongly insists that the proof did not show, and it was intended that it should not show, a case under the Employer's Liability Act; but that the proof made a case where the deceased and the defendant company were, at the time of his injury, engaged in intra-state commerce.

If we should find that the proof showed that the deceased was engaged in interstate commerce when he was injured, then we would be compelled to hold that the trial Judge was not in error in setting aside the verdict for \$10,000.00, and granting the defendants a new trial. The proof indicates that the deceased came into Alton Park on a passenger train, and, as a part of this train, there were three cars loaded with peaches. These cars were taken out of the passenger train at Alton Park, when the train went to the Chattanooga depot. After these fruit cars were taken out of the passenger train, the deceased was directed by one of his superiors, to have them re-iced and then taken to Cravens and delivered to the N., C. & St.

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L. Railroad Company. The proof does not show that the passenger train on which the deceased came into Alton Park, and a part of which the fruit cars were, came from another State, and in fact fails to show where it came from. The proof likewise fails to show how far through, or into what part of Tennessee the railroad of defendant company is located, and to what point it operates trains. It was stated in the oral argument, and is repeated in the briefs of learned counsel for appellants, and the statement is made with much force and emphasis, that there was no proof heard during the first trial that remotely indicated that the deceased had been, or was at the time he received his injury, engaged in interstate commerce. The fruit cars which he was ordered to take and deliver to the Nashville road, so far as this record discloses, were taken out of a passenger train in Alton Park. The proof does not indicate where they came from, whether from another State, or whether they were picked up in Tennessee. The proof does not show where the passenger train came from, or whether it had ever been out of Tennessee or not. These fruit cars were cut out of it at Alton Park, a suburb of Chattanooga. The original declaration avers that the defendant company owns a line of road from Alton Park to Chattanooga, and that the deceased was ordered to take these fruit cars from Alton Park to Chattanooga. He was engaged in obeying these orders when he was injured.

In considering an assignment of error, that there is no evidence to support the verdict, this Court takes as true the strongest legitimate view of the testimony in favor of the verdict, and discards all countervailing testimony, because the jury, whose exclusive province it was to pass upon the credibility of witnesses has, by its verdict, resolved all conflicts in favor of the plaintiff: 96 Tenn., 119; 552; 110 Tenn., 82; 472; 105 Tenn., 187; 106

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Tenn., 723; 112 Tenn., 128; 118 Tenn., 627; 121 Tenn., 715.

In considering the question whether there is material evidence to support this verdict, we are bound to take as true the testimony of plaintiff's witnesses and consider that evidence alone, and if there is conflicting testimony offered by defendants, its testimony must be discarded and not considered in reaching a conclusion upon this assignment. This rule, we think, applies in this case, notwithstanding the trial Judge set the verdict aside and granted a new trial. He did not set it aside because of any dissatisfaction he had of the verdict of the jury, but because of an error he supposed he had made in his charge to the jury. If he had thought there was no evidence to support the verdict, it is manifest that he would have given that as one reason why he set it aside and granted defendants a new trial. We are bound to presume that he believed the verdict sustained by the evidence. Acting under this rule, which has been repeatedly recognized by the Supreme Court, and by which it has often been governed, it is evident to us that a case was not made out by the proof at the first trial, showing that the deceased was engaged in interstate commerce when he received his fatal hurt. We cannot say that the passenger train on which he came to Alton Park had been engaged in such commerce; nor can we say from this record, that the three fruit cars had then come from another State in Tennessee. We do not know where the passenger train came from, nor where these fruit cars came from; all we do know is, they were cut out of the passenger train at Alton Park, and the deceased was ordered to take them down into Chattanooga and deliver them to the N., C. & St. L. Railroad Company. That being true, the deceased and these cars were engaged in intra-state commerce when he received

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his fatal injury, and not in interstate commerce. Being engaged in intra-state commerce, the defendants are liable under the laws of Tennessee, for such negligence as they or their employes were guilty of, that caused the death of plaintiff's husband.

Defendants' learned counsel further, very earnestly, insists that the proof does not make out a case of liability under the common law of Tennessee, and for that reason the trial Judge was right in granting defendants a new trial. We are unable to agree with learned counsel's insistence in this respect. We will not state the evidence on which we base such conclusions, but will content ourselves with the statement of our conclusions on this phase of the case.

We come now to the consideration of the grounds stated by the learned trial Judge as to why he did set the verdict aside and grant a new trial, which is because of error in his charge to the jury. Under the fourth ground stated in the motion for new trial, it is insisted the Court was in error in charging the jury as follows:

"I charge you further, gentlemen of the jury, that it is the law that when a servant sustains an injury while attempting to do something not within the scope of his employment, he cannot recover—and I will state right here, gentlemen of the jury, that one of the contentions of defendants is, that the plaintiff had for the time being abandoned the service and was on his way to supper when he got on the tender, or footboard of the tender, having no duty to perform. If you find from the greater weight or preponderance of the evidence, as detailed to you, that that is true, that the plaintiff's intestate, James Gray, was at the time riding on the engine, not having any duty there to perform, but doing something without the scope of his employment, then I charge you that the plaintiff will not be entitled to recover."

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It is insisted that the effect of this instruction was to place the burden of proving that the deceased was not in the line of his duty when killed, upon the defendant. The trial Judge seems to have reached that conclusion himself, and set aside the verdict and granted the new trial, upon the idea that this part of his charge required the defendant to show by a preponderance of the evidence that the deceased was not in the line of his duty when he was killed. This Court, having very carefully considered the charge complained of, is unable to find any error in it. It is certainly true that, if the deceased while riding on the engine, had no duty to perform while there, and was then without the scope of his employment, his widow could not recover for his death. In the paragraph just preceding, and in the one first quoted, *supra*, the trial Judge says, "One of the contentions of the defendant is, that the plaintiff had for the time being, abandoned the service and was on his way to his supper when he got on the tender, and had no duty to perform at that place." This record shows that such was the contention of defendants during the whole course of the trial in the Court below. It was insisted, and attempted to be proved, that the master mechanic had told the deceased to go to his supper and that he would take charge of the train and have the cars reiced for him when he returned. It was this theory of defendants that the trial Judge was trying to give to the jury when he said that if the deceased, at the time he was riding on the engine, had no duty to perform there, but was doing something without the scope of his employment, his widow could not recover. There can be no doubt of the correctness of these instructions, for, if the master mechanic had directed the deceased to go to supper, and if in fact he had abandoned his work and started to supper, and while on his way thereto got upon the footrest, or foot-

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board at the rear of the tender, having no duty to perform there, the company would not be liable.

But, while we think this a correct statement of the law on the facts given, yet we do not think that instruction placed upon the defendants the burden of proving that the deceased was in line of his duty when he was killed. Taking the facts we have detailed, that the deceased was directed to have these cars iced and then take them to the Nashville Railroad; that he had coupled the engine onto them; that he had opened the switchstand for them to be placed on the main line; that he had re-set the switch after the cars reached the main line; that he then started to the moving cars; we can but conclude, on these facts, that when he attempted to get on the footrest, or footboard, he was acting in the line of his duty, or employment; or at least, under these facts, the jury would have the right to infer that he was then acting within the line of his duty, or scope of his employment. Presumptively, he was so acting when he received the fatal injury. We are of the opinion that the burden of proof rested upon the plaintiff to show he was acting within the line of his employment when he stepped upon the footrest and fell off of it under the moving engine. But, we are also of the opinion that plaintiff had established that fact by a preponderance of the proof; that all the facts and circumstances point to that conclusion, that he was acting within the line of his employment when he got upon the footboard. Now, if the defendants sought by proof, as it did, to show that the deceased had abandoned his employment, or duty, and was on his way home to get his supper, then, the burden of showing that fact certainly rested upon them. We think that, under all the facts and circumstances detailed by all the witnesses, the presumption is that when the deceased got on the footrest, he was acting within the line of his

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employment. When the defendants undertook to show, as the unquestionably did, that he had abandoned his employment and had started home to get his supper and was not then acting within the line of his duty and employment, we think the burden shifted to it to make its case of abandonment. For these reasons we think the trial Judge was in error in setting aside the verdict and granting the defendants a new trial.

We might, perhaps, stop right here and not pass upon the other question, that is, the right of the plaintiff below to so amend her declaration so as to maintain her suit as the personal representative of her deceased husband. It appears that before the case was heard the second time, she had been appointed administratrix of her husband's estate, and had moved the Court for leave to amend the writ and declaration so as to maintain her suit both as the widow and personal representative of her husband. Inasmuch as this application was made more than two years after the death of her husband, the Court overruled her motion and refused to permit the amendment to be made. The case then went to trial, and it appeared from the evidence heard during the second trial, that the deceased was killed while engaged in interstate commerce. At the close of the evidence, defendants moved for a directed verdict in its favor, which was sustained, the jury so instructed and a verdict returned for defendants and plaintiff's suit dismissed. In this Court she assigns as error the action of the trial Judge in refusing to permit her to amend the writ and declaration so as to prosecute her suit as personal representative and widow of her deceased husband; and also it is insisted the Court erred in directing a verdict against her. As we have stated, when the case was first tried, there were substantially two counts in the declaration, one for negligence under the common law of Ten-

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nessee, and one for negligence under the Employer's Liability Act. These counts both made one declaration. The additional count, together with its amendment, made one count of the declaration, while the declaration as originally filed, constituted the other count, and the two counts united formed the declaration on which this case was first tried. 1 Lea, 567; 3 Heisk., 542; 3 Lea, 111; 104 Tenn., 346. So that we have, when the case was first tried, a declaration containing two counts, one under the common law of Tennessee, and the other charging negligence under the Employer's Liability Act. The defendants, never at any time, while the suit was in the lower Court, raised any objection to the declaration on which the case was at first tried. The proof during the first trial, showed a liability for common law negligence, but it must be true that, before the second trial, plaintiff's learned counsel became apprehensive lest the proof in that case show negligence under the Employer's Liability Act, and so then, under the provisions of that Act, she would have no right to maintain her suit as an individual, and could only do so as a personal representative of her husband. To meet that prospective contingency, she sought to amend her declaration and the writ issued in the case, and to sue in her representative capacity as well as in her individual capacity. The trial Judge refused the amendment because he was of the opinion that the two years provided in the Act of Congress, in which to bring her suit as the personal representative of her husband, had expired and she could not, for that reason, maintain the action as the personal representative of her deceased husband.

It appears from a statement made by counsel in his brief, that the trial Judge, in so holding, was governed by the case of *Flatley v. Railroad Co.*, 56 Tenn., 230. In that case it appears the widow sued the Railroad Company

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in her own name and as an individual for the death of her husband. At that time she had no right to maintain such action as a widow. The suit could only be prosecuted by the personal representative of the deceased. After the one year statute of limitations had barred her suit, she sought to amend the writ and declaration by substituting the personal representative of her husband in her place, and to prosecute the action in his name. The Court held that the amendment might be made, but that the action was barred.

The difference between that case and the one at bar is, that in *Flatley v. Railroad Co.*, the amendment sought to make an entirely new party to the suit, and to prosecute from thence on in the name of the new party and to dismiss the suit as to the widow, who had instituted it. The Court held that, such an amendment was the beginning of a new action by a new party, and that the statute of limitation barred the right of the personal representative to maintain his suit. The action of Mrs. Flatley, as well stated by counsel for plaintiff, was a nullity, or, in other words, she had no right of action. It is true that in this case, Mrs. Gray, as an individual, had no right of action under the Employer's Liability Act; but, as the representative of her husband, she did have such right of action. No new party was sought to be added by the amendment, nor was it sought to substitute another party for Mrs. Gray. All she asked by her amendment was, to continue the same lawsuit she had begun, for the same cause of action, in her name as the administratrix of her deceased husband's estate. At the time the amendment was sought to be made, the declaration showed a cause of action under the Employer's Liability Act, and what she desired to do by the amendment, was to prosecute that suit in her representative capacity, as well as in her individual

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capacity. We grant that where an entirely new party is sought to be made, which new party only has a right of action, it is in effect the beginning of a new suit. But, this is not such case. A new party is not added with the view of prosecuting his or her action. The same party seeks to continue the prosecution of the old case under the declaration as originally amended, and to recover under the Employer's Liability Act. All she seeks to do is to prosecute the suit in her representative capacity. We have examined all the cases cited by learned counsel for appellee, and have reached the conclusion that none of them are at variance with the opinion expressed herein. The cases examined are, 1 Sneed, 321; 11 Lea, 88; 4 Baxter, 222; 107 Tenn., 712; 108 Tenn., 104-119; 5 Lea, 454; 10 Lea, 356. Each of these cases might be easily distinguished from the views herein expressed. We will not, however, consume the time or space in doing so.

Counsel for Mrs. Gray have cited, in support of her right to make the amendment, the case of *Railroad Co. v. Wulf*, decided by the Supreme Court of the United States, and reported in 226 U. S. R., 355, which is an opinion delivered by Mr. Justice Pitney of that Court. The facts stated in the opinion show that the son of the plaintiff, Mrs. Wulf, was killed while in the employ of the Railroad Company as a locomotive fireman, and while in the discharge of his duties as such, upon a train going from Parsons, Kansas, to Osage, in the State of Oklahoma. These are substantially the averments of the declaration. The suit was brought in the United States Circuit Court because of the diversity of citizenship, and not under the Employer's Liability Act, but under a statute of the State of Kansas. This suit was brought in her individual capacity, and more than two years after the suit was brought, she was appointed administratrix of her son's estate, and

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asked to be allowed to prosecute the action then pending, in her name, and to have the writ and declaration so amended as that she could also maintain it in her representative capacity as the administratrix of her son's estate. Objections were made to the amendment by the defendants, and these objections overruled and the amendment permitted. There was then a trial and a verdict and judgment in her favor for \$7,000.00 which was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, when the defendant Railroad Company appealed the case to the Supreme Court of the United States. That Court sustained the action of the trial Judge in permitting the amendment, and among other things held that it was not necessary to plead or refer to the Employer's Liability Act in her declaration, and that, although the averments of the declaration were under the Kansas statute, still the reference made to that statute did not vitiate the pleadings. That is true in this case. The averments in the first count of the declaration, or, to be more specific, the averments in the original declaration as filed, did not vitiate the pleadings afterwards allowed and filed by the plaintiff.

The case of *American Railway Co. v. Birch*, 224 U. S. R., 547, was cited by the learned justice, where it was held that the sole beneficiary could not maintain an action, and that there must be a prosecution in the name of the personal representative; yet, stress was laid on the fact that the Supreme Court, in that case, while it reversed the judgment of the lower Court, it did so without prejudice to the rights of the personal representative to bring the suit. Mr. Justice Pitney held that the amendment made was not equivalent to the commencement of a new action; that it was a change of form rather than of substance. He says, "It introduced no new or different

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cause of action, nor did it set up any different state of facts as the ground of action, and, therefore, it related to the beginning of the suit."

The declaration in *Wulf v. Railroad, supra*, showed that the deceased was killed while engaged in interstate commerce. The amended declaration in this case, filed before the case was tried the first time, showed that plaintiff's husband was killed while engaged in interstate commerce. Neither did she seek to introduce a new or different cause of action, but desired to prosecute the same, original cause of action in her capacity as personal representative of her husband. Her amendment did not even so much as bring in a new party, and the only change sought by the amendment was the privilege to prosecute the suit in her representative capacity. She had stated in her amended declaration a cause of action arising under the Employer's Liability Act, but had gone to trial the first time on the declaration alleging negligence under the common law of Tennessee. To maintain her suit in her representative capacity, she only had to prove the facts alleged in her amended declaration, with the additional fact that she had been appointed administratrix of her husband's estate.

We are of the opinion that the case comes squarely within the rule stated by Mr. Justice Pitney in *Railroad Co. v. Wulf, supra*. If the case of *Flatley v. Railroad Company, supra*, is in conflict with the rule announced in *Railroad Co. v. Wulf, supra*, it seems to us that, inasmuch as this question grown out of an Act of Congress, the construction of the Act, placed upon it by the Supreme Court of the United States, is controlling, and that *Flatley v. Railroad Co.* will have to yield to the rule announced by the Supreme Court of the United States. We find, upon investigation, that many Courts in other jurisdictions, are

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in line with the holding of Mr. Justice Pitney in *Railroad Co. v. Wulf*, and in fact that the reason is in favor of the rule and that the weight of authority supports the holding of the highest Court in the land. 62 Missouri, 159; 101 Mass., 378; 134 Mass., 108; 35 C. C. A., —; 31 Cyc., 171.

This Court, after fully and carefully considering the question raised by the action of the lower Court in refusing plaintiff's amendment, has reached the conclusion that the amendment should have been permitted, and that it was error in the trial Judge to disallow it. For the foregoing reasons, we think the trial Judge erred in setting aside the verdict of \$10,000.00 and granting the defendants a new trial. It results that the verdict of the jury for \$10,000.00 will be reinstated and a judgment entered in this Court in favor of the plaintiff, Mrs. Gray, against the defendants for the amount of said verdict for \$10,000.00, and all the costs of this cause.

Cryer v. Mayfield.

C. W. CRYER v. R. L. MAYFIELD.

1. REPLEVIN. *Right to possession. Burden.*

A plaintiff in replevin who does not show by a preponderance his right to the immediate possession of the chattel sued for must fail.

2. SAME. *Replevin by execution debtor.*

An execution debtor whose property has been levied upon cannot maintain an action of replevin against the officer except in cases where the property is exempt from or not subject to levy.

3. PARTIES TO ACTIONS. *Suit by agent.*

A suit styled R. L. M. Agent of N. M. is the suit of R. L. M. and not of N. M. by his agent. The annexing of the words of the words of agency does not have the effect of changing the parties to the action.

4. FRAUDULENT SALES. *Levy upon chattels fraudulently sold.*

An execution creditor may treat a fraudulent sale of chattels by his debtor as absolutely void and may proceed to have the goods attached or levied upon in the hands of the vendee as the goods of his debtor. No suit in equity is necessary.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. PRESTON VAUGHN, Special Judge.

LAURENT BROWN for Plaintiff in Error.

R. L. MAYFIELD for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

Cryer v. Mayfield.

THIS suit involves the right to the possession of some law books and office furniture which was levied upon by a constable, with an execution in his hands, as the property of R. L. Mayfield, a negro lawyer with an office in Nashville, Tennessee. After they were so levied upon, R. L. Mayfield, the negro lawyer, instituted an action of replevin against the officer before a Justice of the Peace, to recover the possession of the property so levied upon. The affidavit was made by R. L. Mayfield, agent of Nathan Mayfield, and it recites that, "Plaintiff is entitled to the possession of the following property," describing it. The bond was executed by R. L. Mayfield, agent of Nathan Mayfield, and so signed. The summons requires the officer to answer the complaint of R. L. Mayfield, agent of R. L. Mayfield. The cause was styled by the magistrate, *R. L. Mayfield, agent of Nathan Mayfield, v. J. H. Linbough*. The judgment by the magistrate was in favor of R. L. Mayfield, agent of Nathan Mayfield. In the Circuit Court the cause was styled, *R. L. Mayfield, Agt., v. C. W. Cryer, et al.* In the Circuit Court "R. L. Mayfield appeared as attorney for plaintiff," and that R. L. Mayfield, attorney for plaintiff produced the bill of sale. The Circuit Judge, sitting without a jury, found the matters in controversy in favor of the plaintiff and rendered judgment accordingly. The defendant moved for a new trial which was overruled, and he appealed to this Court and has assigned errors.

During the trial in the Court below, the Circuit Judge was requested to reduce his findings of fact to writing, which he did, and after so doing the defendant requested him to find other and additional facts, which the trial Court refused. Several assignments are made in this Court, and among them that during the progress of the trial in the lower Court, the defendant offered evidence tending to

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show that the property in controversy belonged to R. L. Mayfield, and for that reason was subject to be levied on for his debts. The trial Judge was of the opinion that this proof was not competent, and sustained an exception to it.

It appears that the only evidence introduced during the trial was a paper writing made the 15th of August, 1903, and signed and acknowledged by the said R. L. Mayfield, which was registered in the office of the register of Davidson County on the 25th of August of that year. This instrument purports to be a conveyance by R. L. Mayfield in consideration of \$200.00 cash, of certain personal property, being an oak desk, chair, Brussell's carpet, sofa lounge, book-case and the books contained in it, wooden chairs, cherry-stained book-case, and the books therein, and everything in the said Mayfield's office at Room No. 8, Napier Court. This conveyance purports to have been made to Nathan Mayfield and, as said, was the only evidence introduced by plaintiff in the Court below. There was no proof to show that the property described in the instrument mentioned, is the same property involved in this replevin suit, and it is insisted by appellant's learned counsel that this being true, there is no evidence to sustain the judgment of the Circuit Judge. There was no proof offered by the defendant during the trial of the cause in the Circuit Court, as to the value of the property in controversy, or as to the value of any one article so involved, and for that reason the cause must be reversed and remanded for the purpose of proving the value of the property in controversy.

In the first place, it seems to be assumed by R. L. Mayfield, who has appeared as counsel for plaintiff in this case, not only in the lower Court but in this Court, that this is a suit by Nathan Mayfield against the officer to recover

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possession of this property. It is not, however, a suit by Nathan Mayfield, but a suit by R. L. Mayfield only. The fact that in the affidavit and the bond made, as well as the writ that was issued and all the proceedings herein, it was recited that R. L. Mayfield, agent of Nathan Mayfield, made the oath and executed the bond, and that the writs so issued did not in fact constitute and make Nathan Mayfield the plaintiff in this action. Adding to the name of R. L. Mayfield, "Agent of Nathan Mayfield," did not make it the suit of the latter. This addition to the name of R. L. Mayfield was only a description of the person then suing as plaintiff in this case. In other words, it is a suit by R. L. Mayfield against the officer to recover the possession of the property upon which the defendant had levied an execution running against R. L. Mayfield, which execution had been issued from a judgment rendered against the said R. L. Mayfield. No matter how many descriptions of R. L. Mayfield may have been annexed or attached to his name, such descriptions could not and did not operate to make anyone else plaintiff in this suit except himself. It was his own suit to recover his own property on which an execution had been levied to satisfy a judgment against him, and in such case the judgment debtor cannot maintain an action of replevin to regain possession of the property unless it is property exempt from execution by the laws of the State. 1 Sneed, 390.

Under the proof offered by Mayfield, that is, the purported bill of sale made the 15th of August, 1903, even if the property described herein is the same as that involved in this suit, such a bill of sale does not show R. L. Mayfield's right to the possession of it. In other words, he has failed to offer any evidence sustaining his claim to the possession of the property involved in this suit. Admitting, however, that it is a suit of Nathan Mayfield

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against the officer to recover the possession of this property, it is clear to our minds that the evidence, offered by the defendant tending to show that the instrument relied on and offered in evidence by R. L. Mayfield, was an is a fraudulent scheme and device to cover up and conceal the property from his judgment creditors, and that it in fact and in law was his property and not the property of Nathan Mayfield, was competent and should have been heard by the trial Judge as proof tending to show that this was R. L. Mayfield's property. The trial Judge excluded the evidence on the ground that it was not competent to make such proof in an action of replevin in a Court of law, and that defendant's relief or remedy was in a Court of equity.

Appellant, however, insists that this was a fraudulent scheme and device concocted by R. L. Mayfield to hinder and delay and defraud his creditors; that the property has at all times remained in his possession since the execution of the instrument; that he has used it as his own and disposed of some of it as his property; that Nathan Mayfield was an old man who could neither read nor write, had no use for such property, was a day laborer and had no money with which to pay the \$200.00 consideration recited in the instrument, and for these reasons, and others insisted upon by him, this pretended conveyance was utterly void, and being utterly void, the title, notwithstanding the written instrument, still remained in R. L. Mayfield and was subject to be levied upon by the judgment creditors for the satisfaction of his debts.

Under section 1759 of Shannon's Code, fraudulent conveyances, schemes and other devices, are utterly void, any pretense, color, feigned consideration, or any other matter or thing to the contrary notwithstanding.

In 14 Cyc., 311, the rule is stated that, "A creditor of the fraudulent grantor may, therefore, conduct him-

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self and treat the property thus pretendedly conveyed, as if the deed had never existed. He may levy his execution upon the property and subject it to sale for the satisfaction of his debts."

In 20 Cyc., 658, it is said, "A judgment creditor may in most jurisdictions, levy an execution upon the property constituting the subject of the fraudulent conveyance by his debtor as though it never existed," and where the fraudulent grantee brings a replevin suit against the officer levying an execution upon the property, such officer should be permitted to show that the conveyance was fraudulent and void. 20 Cyc., 666.

It is held by the Supreme Court of this State that, where goods had been fraudulently transferred, they still remained the property of the fraudulent grantor and may be followed by his creditors until his liability is extinguished. 21 Pickle, 372; 5 Cold., 160.

Under the statutes of this State, as shown under subsection 6, of section 5211 of Shannon' Code, an attachment may be issued at law and levied upon property which has been fraudulently disposed of or is about to be fraudulently disposed of. There can be no doubt that property fraudulently disposed of, may be levied upon by execution at law as the property of the fraudulent conveyor to satisfy a judgment against him; or where the conveyee brings an action of replevin to recover the possession of it from the officer, it is competent to show by proof that the conveyance under which the plaintiff in such case claims the property, was fraudulent and void, and that the property still remains that of the fraudulent conveyor, or judgment debtor.

We are of the opinion that it was competent for the defendant to show by any proof, parol or documentary, or by circumstances, that the property levied on in this case

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was that of R. L. Mayfield, and if he sought to show that he had conveyed it to someone else, it was then competent to show in this action, that such conveyance was fraudulent and void as against his creditors, those existing at its date and those subsequent thereto, and for these reasons the trial Judge was in error in excluding such proof.

If there was proof of the value of this property, we would consider the evidence offered by defendant below as it appears in the record, and pronounce such judgment as he should have rendered in the case. The absence of the proof of the value of the property, and also the absence of properly verified copy of the warrant, judgment and execution issued thereon, makes it necessary to reverse the cause and remand it for another trial, to the end that such proof that defendant may have, tending to show that the property in dispute is that of R. L. Mayfield, and that the instrument offered in evidence by him is fraudulent and void may be heard in the Court below, and to the further end that the defendant may prove the value of the property in controversy and put in evidence a certified copy of the warrant issued in his favor against R. L. Mayfield and a copy of the judgment in that case and of the execution issued therefrom and levied upon the property in suit, which certified copies we think are necessary in order to sustain the validity of the levy of the execution; and it results that the cause is reversed and remanded to the Circuit Court for another trial in accordance with the principles announced in this opinion.

The said Mayfield and the surety on his bond, will pay the cost of this appeal.

Telegraph Co. v. Miller.

POSTAL TELEGRAPH COMPANY V. B. J. MILLER:

Affirmed by Supreme Court, 1914.

1. TELEGRAPH COMPANIES. *Negligence in transcribing and transmitting messages. Proximate cause of financial loss.*

A telegraph company whose agents so confuse a message and garble its words as to change its original wording from twelve hundred to twenty hundred cases of eggs is liable in damages to the sendee for all losses occasioned by him in collecting and shipping twenty hundred instead of twelve hundred cases, as he was requested so to do by telegram.

2. SAME. *Liability of original contracting party. No answer to case against telegraph company.*

The fact that the sendee could also have sued the sender for breach of an original agreement to take twenty hundred cases is not sufficient excuse for the telegraph company when sued for its mistake. The sendee had the right to elect to abandon his claim against the sender or to treat the contract as for twelve hundred instead of twenty hundred cases.

3. SAME. *Notice of claim. Waiver.*

Although a notice provision as to a claim for damages of thirty days usually found upon the backs of telegrams is valid, it can be waived; and the company will be held to have waived the same or estopped itself to rely upon failure to file the claim where immediately upon the loss happening the party sustaining the loss communicated with the company's agent and carried on with him for the stipulated period negotiations looking to a settlement.

FROM FRANKLIN COUNTY.

Appeal in error from Circuit Court of Franklin County.
NATHAN BACHMAN, Judge.

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FELIX D. LYNCH for Plaintiff in Error.

ESTILL & LITTLETON for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THE defendant in error, B. J. Miller, was and had been for several years a wholesale produce dealer in the city of Winchester, Tennessee. The firm of Henneberger & Herald were wholesale commission merchants in the city of New York, and had an agent in the city of Nashville, Tennessee, one E. B. Phelps, who represented them in their southern territory.

On February 26, 1912, this agent, Phelps, called the defendant in error Miller over the telephone from Nashville and agreed to purchase from said Miller his entire week's receipts of eggs, same to be shipped to Henneberger & Herald at New York. Miller told Phelps in the conversation over the telephone that he did not know what his receipts for the week would be, but that they usually ran from fifteen hundred to three thousand cases. The price agreed on for the eggs was twenty-six cents per dozen for Miller's entire week's receipts.

On the same day, February 26th, and after the conversation over the telephone, Phelps sent Miller a telegram confirming the purchase as follows: "We confirm our guarantee twenty-six. Sold your entire receipts this week." Signed, "E. B. Phelps."

On the same day that the telephone conversation was had, and the above telegram was sent and received, defendant in error Miller made contracts, as was his usual custom, with local dealers for their entire week's receipts of eggs.

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On February 27th Henneberger & Herald delivered to the plaintiff in error, Postal Telegraph Cable Company, at its office in New York, the following telegram, addressed to the defendant in error Miller at Winchester, Tennessee: "Confirm guarantee twenty-six cents this week's shipments about twelve hundred ship part tomorrow. Can we sell to arrive." Signed, "Henneberger & Herald.'

This telegram was transmitted by the plaintiff in error to the Western Union Telegraph Company at Chattanooga, from which point it was transmitted by the latter company to the defendant in error at Winchester, the plaintiff in error having no office at Winchester. The telegram was delivered to the defendant in error Miller at Winchester by the Western Union Telegraph Company on the same day that it was delivered to the plaintiff in error in New York, February 27th; but reached the defendant in error in a garbled condition as follows: "Confirm guarantee twenty-six this week's shipment about twenty hundred ship parts tomorrow. Can we sell to arrivals." Signed, "Henneberger & Herald.'

The material alteration in the telegram, as delivered to Miller (sendee) from the one delivered by Henneberger & Herald to the plaintiff in error, being "twenty hundred" instead of "twelve hundred."

At the time this telegram was sent by Henneberger & Herald defendant in error had purchased for immediate delivery two thousand cases of eggs, and he alleges in his declaration that Henneberger & Herald would only receive twelve hundred cases of the eggs at twenty-six cents, and that he was forced to sell eight hundred cases at a loss of four cents per dozen on account of a decline in the market price of eggs between February 27th and February 29th (on which latter date the error in the telegram of

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February 27th was discovered), from twenty-six cents per dozen to twenty-two cents per dozen.

The declaration further alleges that between the dates of February 27th and February 29th, the plaintiff could and would have sold and disposed of said eight hundred cases of eggs at the price of twenty-six cents per dozen, but for the misinformation contained in said telegram, which was due to the negligence of the plaintiff in error and the Western Union Telegraph Company, in garbling said message. The Western Union Telegraph Company was also sued jointly with the plaintiff in error.

The defendant below filed the following pleas: (1) The general issue; and (2) that the message contained a contract providing that the defendant shall not be liable for damages in any case where the claim is not presented in writing within sixty days after the message is filed for transmission, and that the claim sued on was not filed or presented in writing within sixty days as provided in said contract. Two other pleas were filed, which were demurred to by the defendant in error, and said demurrer was sustained by the Court and said pleas were stricken out, and the same need not be further noticed.

The defendant in error filed a replication to the second plea, alleging that the defendant below had waived the stipulation in the contract requiring claim for damages to be filed in writing within sixty days from the date said message was delivered to them for transmission.

Upon a trial of the case before the Circuit Judge, without the intervention of a jury, a judgment was rendered against the plaintiff in error for \$960.00 and costs of suit, the suit being dismissed as to the Western Union Telegraph Company.

From the judgment rendered against it the Postal Telegraph Cable Company appealed to this Court, after its

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motion for a new trial had been overruled, and has assigned errors.

The first error assigned is to the effect that there is no evidence to sustain the judgment of \$960.00 rendered against the Postal Telegraph Cable Company.

At the close of all the proof in the case, a request was made of the Court by the Postal Telegraph Cable Company, for a special written finding of facts, which was made and filed as a part of the record in the case. In his finding of facts the Circuit Judge finds that the defendant in error had a valid contract with Henneberger & Herald, made through their agent Phelps, to accept his week's receipts of eggs at twenty-six cents per dozen, but that on February 2th, 1912, before the eggs were shipped to New York, Henneberger & Herald delivered to the plaintiff in error, Postal Telegraph Cable Company, the following message addressed to the defendant in error at Winchester, Tennessee: "Confirm guarantee twenty-six cents this week's shipments about twelve hundred ship part tomorrow. Can we sell to arrive." Signed, "Henneberger & Herald."

That this telegram was transmitted by the plaintiff in error, Postal Telegraph Cable Company, to Chattanooga, where it was delivered to the Western Union Telegraph Company, and transmitted by that company to the plaintiff in error on the same day, in the following words: "Confirm guarantee twenty-six this weeks shipments about twenty hundred ship parts tomorrow. Can we sell to arrivals." Signed, "Henneberger & Herald."

That upon receipt of this telegram, defendant in error wrote to Henneberger & Herald that he had received their telegram reading twenty hundred cases; that Henneberger & Herald had also on February 27th written a letter to defendant in error, confirming telegram of that date, read-

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ing twelve hundred cases; that this letter was received by the defendant in error on February 29th; that between the dates of February 29th and February 27th, eggs had declined on the market from twenty-six cents to twenty-two cents per dozen; that between the 27th and the 29th of February, defendant in error could and would have disposed of the remainder of said two thousand cases of eggs, which the Court found he had on hand, if he had known that Henneberger & Herald would have received only twelve hundred cases, and that by reason of the misinformation contained in the message of February 27th, defendant in error was forced to dispose of eight hundred of the two thousand cases of eggs at a loss of four cents per dozen, amounting to \$960.00.

The defendant in error testified that Henneberger & Herald refused to take more than twelve hundred cases; that he did not learn until he received their letter of February 27th, which was on February 29th, that they did not want but twelve hundred cases. He says that eggs were worth twenty-six cents per dozen on the market on February 27th, and that he could have disposed of the entire two thousand cases at twenty-six cents on that date, and that but for the telegram of February 27th from Henneberger & Herald, saying that they would take two thousand cases at twenty-six cents, he would have disposed of all of his eggs at that price. He says he failed to so dispose of them because of the misinformation contained in the telegram of February 27th, which read "twenty hundred" instead of "twelve hundred." He was not cross-examined by counsel for the plaintiff in error upon this statement as to his loss.

We are of opinion that this statement constitutes some evidence of the loss sustained by him, and is evidence supporting the fact found by the trial Judge that he did sus-

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tain such loss. The first assignment of error will, therefore, be overruled. It is the well established rule of this Court that where there is any evidence to support the finding of the trial Judge it is conclusive.

By the second assignment of error it is insisted that the negligence of the plaintiff in error, in garbling the message of February 27th, so as to read twenty hundred instead of twelve hundred cases, was not the direct and proximate cause of the plaintiff's loss.

It is insisted that the proof shows, and the trial Judge so found, that the defendant in error had a valid contract with Henneberger & Herald to accept his entire week's receipts at twenty-six cents per dozen, and that he could have compelled them to accept said two thousand cases at that price, notwithstanding the telegram delivered by them to the defendant in error on February 27th, addressed to him at Winchester, notifying him that they only wanted twelve hundred cases, and that the direct and proximate cause of defendant in error's loss was the failure of Henneberger & Herald to carry out their contract.

We are of opinion that this contention is not sound. The uncontradicted proof shows, and the Circuit Judge so found, that the message in question was garbled on the plaintiff in error's line, and that if it had not been for the misinformation contained in said message, defendant in error could and would have disposed of said eight hundred cases of eggs between the date of February 27th and February 29th, at twenty-six cents per dozen, which was the price to be paid for them by Henneberger & Herald. While it may be true that defendant in error would have had the right of action against Henneberger & Herald for a breach of their contract, still, we think, he had a right of action against the plaintiff in error for failing to correctly transmit the message of February 27th. We

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think it cannot be question that the failure to correctly transmit said message was one of the direct and proximate causes of his loss, for the reason, the undisputed proof shows, that but for the misinformation contained in said message, he could and would have disposed of his eggs without loss.

If it should be conceded that defendant in error had a right of action against Henneberger & Herald for a breach of their contract, we think it is also true that he had a right of action against the plaintiff in error for failing to promptly transmit the message of February 27th, which would have enabled him to dispose of the eight hundred cases to other dealers at twenty-six cents; and we think we had a right to elect as to which of the parties he would hold responsible for his loss. In other words, we think he could have sued either of both of them for his loss. He was not bound to pursue his remedy against Henneberger & Herald, when he also had a right of action against the plaintiff in error growing out of its negligence in transmitting the message, which was one of the direct and proximate causes of his loss.

"In instances where the wrongful acts of two or more persons occur as proximate causes of the injury, the wrongdoers are liable jointly or separately, and the fault of one is no defense for the other or others." *Beopple v. Railroad*, 104 Tenn., 420, and the cases there cited.

We do not think the holding of the Court in the cases of *Manier & Co. v. Western Union Telegraph Company*, 94 Tenn., 442, and *Telegraph Co. v. Mumford*, 87 Tenn., 190, sustain the contention of the plaintiff in error that its negligence was not one of the direct and proximate causes of the defendant in error's loss.

In the first mentioned case it was held that the Telegraph Company was not liable, because it was shown that Manier

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& Company had entered into an agreement by which the goods of their debtor were sold at a sum greatly below their actual value, and that this was the direct and proximate cause of their loss. And in the latter case it was held that the delay in the delivery of the message was not in consequence of the error in transmission, but was the result of the subsequent and independent negligence of the South Florida Telegraph Company, and not the Western Union Telegraph Company, which was the only company sued. It appeared in that case that there was a stipulation indorsed on the message expressly releasing the Western Union Telegraph Company from all liability for damages growing out of the negligence of a connecting line, and the negligence resulting in loss to the plaintiff Mumford having occurred upon a connecting line, the South Florida Telegraph Company, it was held that there could be no recovery against the Western Union Telegraph Company.

It is not insisted that the defendant in error was guilty of any negligence or other act that contributed to his loss. Nor is it controverted that the plaintiff in error was guilty of negligence in transmitting the message of February 27th, which, if it had been correctly transmitted, would have enabled the defendant in error to sell his eggs to other dealers at twenty-six cents per dozen, the price that Heneberger & Herald had agreed to pay for them.

By the third and last assignment of error it is insisted that the Court erred in holding that the plaintiff in error had waived the stipulation in the contract, under which the message of February 27th was transmitted, providing that the company should in no event be liable for damages or statutory penalties, unless the claim was presented in writing within sixty days after the message was filed for transmission.

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It is insisted that there is no evidence to sustain the finding of the trial Judge that the plaintiff in error had waived this provision of the contract, which, the proof shows, was never complied with.

We are of opinion that this contention is not sound. The evidence shows that immediately upon the receipt of the letter of Henneberger & Herald written on February 27th, defendant in error went to the agent of the Western Union Telegraph Company at Winchester and informed him of the error in the telegram of February 27th, and told him what the damage to him (defendant in error) would be, and that he was going to hold the Telegraph Company responsible for the loss. He was told by the agent of the Western Union Telegraph Company that he would investigate the matter and ascertain on which line the error occurred, and he did make such an investigation and within a few days reported to the defendant in error that the error in the message occurred on the line of the Postal Telegraph Cable Company. Thereupon, defendant in error wrote to Henneberger & Herald, requesting them to take the matter up with the Postal Telegraph Cable Company. Henneberger & Herald did call the manager of that company over the telephone and he came to their office in the city of New York, and he was advised by Henneberger & Herald of the error in said telegram, and of the probable loss, and he agreed to investigate the matter and ascertain whether or not the error occurred on the line of his company, and finally reported to Henneberger & Herald that the error was not made by his company, but was made by the Western Union Telegraph Company.

Thereupon, the matter was again taken up with the manager of the Western Union Telegraph Company in New York, and finally, after considerable negotiation by Henneberger & Herald with the managers of the two com-

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panies, and after the sixty days had expired, it was suggested to Henneberger & Herald that the defendant in error would have to file a claim in writing, which was done by Henneberger & Herald, as his agents, within twenty-four hours after it was suggested that the claim should be filed.

It was held in the case of *Telegraph Co. v. Courtney*, 113 Tenn., 485, that the object and purpose of the stipulation in the contract requiring a claim for damages to be filed in writing within sixty days from the date the message was delivered for transmission, is that the company may have notice of the claim made against it, and intelligently settle with the plaintiff, or prepare its defense while the facts are known and evidence of them obtainable.

We are of the opinion that the verbal notice given by the plaintiff to the plaintiff in error's manager was sufficient to acquaint the plaintiff in error with all the facts necessary to protect itself against an unjust claim, and this was done while the facts were fresh and easily obtainable, and the plaintiff in error undertook an investigation of the facts and did investigate them without any request that the defendant in error file the claim in writing until the sixty days had expired. We think this constituted a waiver of the provisions contained in the stipulation; and there was no error in the trial Judge so holding.

The judgment is affirmed with costs.

M. & A. of Brownsville v. Marr.

M. & A. OF BROWNSVILLE v. A. M. MARR, ADMINIS-
TRATOR.

Affirmed by Supreme Court, at Jackson, 1915.

1. DOMICIL. *Loss of. Removal intention.*

A party who has acquired a fixed domicil will not be held to have lost the same unless there be conjoined an actual removal and an intention of relinquishing the old domicil and acquiring a new one.

2. SAME. *Temporary absence. Purpose. Taxation.*

A non-resident of a city who removes to the city for the avowed purpose of securing medical treatment and attention and with no intention of relinquishing his domicil in a rural district will not be held to have become a citizen of the city for taxing purposes, notwithstanding long continued residence therein, provided the original purpose of the removal to the city be not accomplished.

FROM HAYWOOD COUNTY,

Appealed from the Chancery Court of Haywood County.
COLLIN MCKINNEY, Chancellor.

KINNEY & WILLS for Complainant.

A. M. MARR for Defendant.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is a bill filed by the State of Tennessee and the Board of Mayor and Aldermen of Brownsville, Tennessee,

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against A. M. Marr, Administrator of the estate of F. L. Seymour, deceased, R. T. and J. T. Seymour, and L. G. Graves, sureties on the said A. M. Marr's administration bond, to recover certain taxes alleged to be due the City of Brownsville from the estate of F. L. Seymour, deceased, for the year 1912, in the sum of \$281.09, including interest, costs and penalties.

There was a decree in the Court below in favor of the complainant for said taxes, interest, costs and penalties against the administrator, from which he has appealed to this Court; has assigned errors upon said decree, and seeks a reversal of the same.

The record discloses that F. L. Seymour was about 66 years of age at the time of his death, which occurred in October, 1912. He had been a *non-compos mentis* all of his life, and had a regular guardian. He owned an estate, at the time of his death, valued at about \$14,500.00. This estate consisted almost entirely of money. He owned no real estate. He had never been married, and prior to April, 1911, had resided some distance from the City of Brownsville, in Civil District No. 1, of Haywood County, at the country place of his sister, Mrs. Powell, a woman of considerable means, who, up until the year 1910, had been his regular guardian and looked after his business affairs. She resigned the guardianship for her brother in 1910, when one R. M. Chambliss, who resided in the City of Brownsville, was appointed by the County Court of Haywood County to succeed the said Mrs. Powell. F. L. Seymour resided in a house that had been erected in the yard at Mrs. Powell's residence in the country, and had been furnished for him by her, and he took his meals at her residence, she charging him for same.

In January, 1911, Mrs. Powell, being an old lady and in bad health, decided to go to Brownsville and put her-

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self under the treatment of a physician of that city, Dr. Allen. She rented out her country home to a Mr. Marshall, reserving two rooms in the residence for herself, and reserving the house or room in the yard for her brother, F. L. Seymour, who subsequently took his meals with Mr. Marshall and slept in the house in the yard. Soon after Mrs. Powell went to Brownsville she purchased a house and lot on West Main street in that city, which she rented to one E. P. Nelson, reserving a couple of rooms for herself, and took her meals with her tenant. She says she bought this house and lot for an investment, and never intended to make Brownsville her home, but was only sojourning in Brownsville temporarily for medical treatment.

In March, 1911, she made a visit to her country home to see her brother and found him ill. She called a physician, Dr. James T. Seymour, who treated her brother at his home in the country for some days. It developed that her brother had Bright's disease, and needed more skillful treatment than Dr. Seymour was able to give him. He advised Mrs. Powell to have her brother removed to a hospital in Memphis for treatment, but Mrs. Powell preferred to have her brother where she could be with him and personally look after him in his illness. She advised with Dr. Seymour about carrying her brother to Brownsville and putting him under the treatment of Dr. Allen. Dr. Seymour agreed to this, telling Mrs. Powell that he thought Dr. Allen was in a position to give her brother the treatment necessary in his case. Thereupon, Dr. Seymour went to Brownsville, consulted Dr. Allen, gave him a history of the case and the treatment that he had been administering, and arranged to put F. L. Seymour under his treatment.

At first F. L. Seymour declined to go to Brownsville for treatment, preferring to remain in the country, but upon finally being told by Dr. Seymour that he could not

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recover unless he did go to Brownsville and receive the necessary treatment, he consented to go, and did go the latter part of April, 1911. After going to Brownsville he occupied one of the rooms that had been reserved by his sister in the Nelson home, and took his meals with the Nelson family, his guardian paying board for him, and also paying for the keep of his horse and buggy, which he carried with him.

Immediately after going to Brownsville he was put under the treatment of Dr. Allen, and his condition improved. On July 4, 1911, he returned to his country home, where he remained until sometime in October, 1911, when his condition grew worse. He returned to Brownsville, and again went under the treatment of Dr. Allen and remained under his treatment until about the first of October, 1912, at which time his condition became serious, and he begged his physician and sister to be permitted to return to his home in the country. His sister took him home, and he died in about three weeks after his return at the place where he had always resided. A special nurse was kept with him practically all the time while he was in Brownsville, and after he returned to the country.

The record discloses that soon after he went to Brownsville, he transferred by letter his membership from Harmony Baptist Church in the country to the Baptist church in Brownsville. His sister says she protested against his removing his church membership from the country to Brownsville, but he insisted on doing so, and after a conference with a relative, Jimmie Powell, about the matter, she finally consented to his joining the church in Brownsville.

It also appears that in the fall of 1911, with the consent and knowledge of his sister, he voted in a city election in Brownsville. The proof does not disclose whether this

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was a regular city election, or a primary election. Mrs. Powell says that she never objected to his voting in the election. In fact, she says she never thought very much about it. The proof shows that F. L. Seymour had always voted in the elections in the country before going to Brownsville, and that he was a person who could be easily persuaded to participate in such matters, and upon this occasion had been solicited by one of his nephews by marriage to do so.

Mr. Thomas, the county tax assessor, testifies that upon one occasion F. L. Seymour told him that he had removed and was living in Brownsville with his sister, and he says, after talking with him, he assessed F. L. Seymour for taxes in the Brownsville district for the year 1912. He also says that he talked with Seymour's guardian with reference to assessing Seymour for taxes in the Brownsville district. While he does not state what the guardian said to him in regard to assessing his ward for taxes in the Brownsville district for the year 1912, he admits that the guardian did not authorize him to do so. He says he made the assessment upon his own judgment. The guardian testifies that he told the assessor that F. L. Seymour's residence was in district No. 1 of the county, and that he was not assessable for taxes in the Brownsville district, which is district No. 7 of the county. He also says that the assessment was made by the tax assessor in the Brownsville district without his knowledge or consent.

The proof shows that under a charter provision of the City of Brownsville the county and State assessment is made the assessment of the city. In other words, the city makes its assessment from the valuation appearing on the tax books of the county.

It further appears that the defendant, A. M. Marr, administrator, paid the State and county assessment as made

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in the Brownsville district sometime after the death of F. L. Seymour, and after he had been settled with by the guardian. He refused, however, to pay the city assessment upon the ground that F. L. Seymour was not a resident of Brownsville on January 10, 1912, which was the date when the assessment was made, but was only sojourning in Brownsville temporarily, and insisting that his permanent residence upon that date was in district No. 1 of the county.

It appears that while F. L. Seymour was under the treatment of Dr. Allen in Brownsville he frequently expressed the desire to return to his home in the country, and often asked the physician when he would be well enough to return to his home. However, the proof shows that F. L. Seymour was, perhaps, incapable of choosing his own residence, because the proof shows that his mind was very weak, and according to the testimony of some of the witnesses, was very much like that of a child's. However, we think the great weight of the evidence shows that he regarded his residence and home as being in the country all the time he was in Brownsville. The proof shows that he carried the key to the house in which he had formerly lived in the country, after he went to Brownsville, and did not carry any of his furnishings or even his trunk with him to Brownsville. He only carried a suit case.

He would often talk with young Mr. Marshall, the son of the man who lived at his sister's place in the country, and who frequently called to see him while he was in Brownsville, and express a desire to return home and talked about going home. Both his sister and guardian testify that he was only temporarily in Brownsville for medical treatment. Dr. Allen, his physician, says that while he was there under his treatment he understood and regarded his stay in Brownsville as only temporary. It is shown

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that in July, 1911, when his health improved, he returned to his home in the country, and remained there until his condition grew worse. And in October, 1912, when all hope of his recovery had been abandoned, he returned to his home in the country and died there.

We are of opinion that the foregoing facts clearly establish that F. L. Seymour never was, at any time, a resident of Brownsville, but his residence was all the time in the country. His stay in Brownsville was only temporary, and, in our opinion, his property was not assessable by the city for taxes. The fact that his guardian resided in Brownsville did not render his property assessable for taxes by the city.

The General Assessment Act of 1907, under which said taxes were assessed (there being no assessment Act passed by the Legislature in 1909) provides that personal property held by trustees and guardians of minors, married women and lunatics shall be assessed to each guardian or trustee in the county, ward, or district where such minor, married woman, or lunatic resides, if a resident of the State; and if a non-resident, then in the county, ward, or civil district in which the guardian or trustee resides, provided that guardian funds shall be assessed in the county where the guardian having control thereof renders his annual settlement. Chapter 602, Acts of 1907, section 5, sub-section 3.

It was held in the case of *Stratton v. Brigham*, 2 Sneed, 419, in discussing what is a non-residence in the sense of our attachment laws, the Court said:

"There is no doubt a distinction between residence and domicile. The domicile is the habitation fixed in any place with an intention of always staying there. In this sense, he who stops even for a long time in a place, for the man-

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agement of his affairs, has only a simple habitation there, but has no domicile. . . . But when used in connection with subjects of domestic policy—as, taxation, settlement, voting, and the attachment law—the term ‘domicile’ has a more confined and restricted import, and implies the same as residence; that is, the home or habitation fixed in any place, without a present intention of removing therefrom.

“And, therefore, a change of place for a temporary purpose, with an intention to return, is not a change of residence or domicile.”

In the case of *Kennedy v. Wiggins*, 5 Hum., 127, the Court defines residence to be: “To reside means to dwell permanently, as for a length of time; to have a settled abode for a time.”

In Am. & Eng. Ency. of Law (2d Ed.), Vol. 24, 693, residence is there defined to be “the abiding or dwelling in a place for some continuance of time. There must be a settled, fixed abode or intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence.”

“Whether a party’s removal constitutes a change of residence depends upon the party’s intentions in making such removal.” *Idem*, 697.

Mr. Brown, in his law dictionary (Rawl’s Revision, 905) defines “resident” as a person coming into a place with intention to establish his domicile or permanent residence, and who in consequence actually remains there. He further says: “Time is not so essential as the intent, executed by making or beginning an actual establishment, though it be abandoned in a longer or shorter period.”

This question was discussed in *Hascall v. Hafford*, 107 Tenn., 361, and it was there held that though the decedent had voted in elections in Tennessee, and had been elected

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to the office of alderman of the town in which he lived, and had deported himself in many ways that indicated that he was a resident of Tennessee, still these matters were not conclusive. It was held in that case that the declarations of the deceased in respect of his home in another State and his intention to return to it, outweighed the fact of voting in a primary election, or running for office, as indicating the real purpose of the party.

In *Devine v. Dennis*, 1 Shan., 378, it was said that facts indicating that a party was a permanent citizen of Tennessee, such as voting in our elections, suing and being sued in our Courts, paying taxes, renting land, etc., are overcome by his repeated declarations that he was a citizen of the State of Kentucky. This was a case involving the question of non-residence as a ground for attachment, and the Court held that the question of residence was one of intention.

In *Keelin v. Graves*, 129 Tenn., 103, in discussing the question of residence or domicile in the sense of our attachment laws, our Supreme Court said:

“We think the substance of our cases is that, in order to destroy the status of a party as the possessor of a domicile once acquired in this State, it must appear that he has removed into another State for the purpose of making it his home, and that his removal for purposes of business, though long continued, will not have the effect of changing his domicile, if he has the purpose of returning to this State upon the completion of the business, but that a mere floating purpose to return to this State at some time will not be sufficient to destroy the presumption that his change of residence imported also a change of domicile.

Without citing and discussing further authorities, we are of opinion that each case must be judged upon its own

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facts in determining the question of residence or domicile. We are of opinion that the great weight of the evidence in the case at bar is that there never was any intention upon the part of F. L. Seymour, in so far as he had mental capacity to decide the question for himself, to become a resident of the City of Brownsville, nor was it the intention of his sister or his guardian that he should do so. He went to Brownsville for medical treatment only, and it was clearly the intention of himself, sister and guardian that he should return to his home in the country when his treatment had been completed, and he did so and resided there at the time of his death.

Nor do we think that the mere fact that the administrator paid the State and county taxes assessed against his property in the Brownsville district for the year 1912, after his death, and without protest, is sufficient to establish that he was a resident of Brownsville at the time aid taxes were assessed. In other words, this did not fix the status of the deceased at the time said assessment was made. The administrator knew that he would have to pay taxes to the State and county on his intestate's property for the year 1912, and the question of the place of assessment was not very material. If he had refused to pay on the assessment made in the Brownsville district, no doubt the authorities would have then assessed him in district No. 1, as they would have had a right to do.

The decree of the Chancellor is reversed, the bill is dismissed, and the Board of Mayor and Aldermen of Brownsville will be taxed with the costs of the cause.

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JAMES A. LUNSFORD V. ANDY JOHNSTON ET AL.

Affirmed by Supreme Court, 1915.

PUBLIC OFFICIALS, *Superintendent of workhouse. Assault and battery by subordinate.*

Neither the superintendent of a county workhouse nor his surety is liable in damages to an inmate of a county workhouse who is assaulted and beaten by a subordinate employe of the superintendent where the assault was committed in the absence of the superintendent and without his connivance or acquiescence and where the subordinate is engaged by the superintendent for the workhouse commission and whose compensation is paid by drafts upon the county. In such case the subordinate is an employe of the county or the workhouse commission and not of the superintendent.

FROM KNOX COUNTY.

Appeal in error from Circuit Court of Knox County.
V. A. HUFFAKER, Judge.

C. M. ROBERTS and W. B. FORD for Plaintiff in Error.

MAYNARD & LEE and JOHNSON & COX for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS suit was brought before a Justice of the Peace of Knox County by James A. Lunsford, as next friend of M. E. Lunsford, a minor under twenty-one years of age, against Andy Johnston, superintendent of the workhouse

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for Knox County, Tennessee, Aetna Accident & Liability Company, surety on the official bond of said Johnston as such superintendent, and Sam Hall, a guard at said workhouse, to recover damages for personal injuries inflicted upon the said M. E. Lunsford while a prisoner at said workhouse, by the said Sam Hall shooting him while attempting to make his escape from said workhouse.

The case was finally carried to the Circuit Court of the county, where it was tried before the Circuit Judge without the intervention of a jury, and judgment was rendered against all of said defendants for \$250.00, damages, and costs of the cause. At the same term of the Court, however, the Circuit Judge modified his judgment in said case by dismissing the suit as to the defendants, Andy Johnston and Aetna Accident & Liability Company, but allowed said judgment to remain as against the defendant, Sam Hall.

From the judgment dismissing his suit as to the defendants Johnston and Aetna Accident & Liability Company, plaintiff appealed to this Court, after his motion for a new trial had been overruled, and has assigned errors.

The only error assigned is that there is no evidence to support the judgment of the Court.

The proof shows that M. E. Lunsford was shot by one Sam Hall, a guard at the Knox County workhouse, on June 19, 1914, while attempting to make his escape from said workhouse, where he was confined as a prisoner, and was serving a workhouse sentence for a misdemeanor. The defendant, Andy Johnston, was superintendent of the workhouse, and was also a member of the Knox County Road Commission.

Under the provisions of chapter 264 of the Private Acts of the General Assembly of 1913, a board of road commissioners for Knox County was created to be composed

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of three members, one of whom should be known as the superintendent of the county workhouse, and the guards at said workhouse were to be employed by said superintendent, with the advice and approval of his associates. The Aetna Accident & Liability Company was surety on the official bond of said Johnston.

The proof shows that Johnston was not present when the shooting was done, and the record fails to show any personal negligence on the part of the defendant Johnston in the commission of said tort by Hall. In fact, the evidence tends to show that he knew nothing of the shooting until after it was done. There is no evidence tending to show that the defendant Johnston, as a member of said board of road commissioners, failed to exercise reasonable care in the selection of the defendant Hall for the position of guard at the county workhouse. The defendant, Sam Hall, was employed by the commission, or rather by the defendant Johnston, with the advice and approval of his associates, pursuant to the authority given him by the provisions of said Act.

It also appears that under the provisions of said Act that the guards employed at said workhouse are paid for their services by the county, and are subject to the orders of the superintendent of the workhouse.

The Act further provides that the superintendent shall, before entering upon the duties of his office, execute and deliver to the county court clerk a surety bond in the sum of \$5,000.00, payable to the State of Tennessee, approved by the County Judge or Chairman, for the safe keeping of all property entrusted to his care, and for the faithful performance of his duties. Any willful misconduct or any negligence or any inefficiency shall be grounds for his removal from office by the Quarterly County Court under the provisions of said Act.

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We think it is clear from the provisions of said Act that Hall was not a servant of the defendant Johnston at the time he did the shooting, but was the agent and servant of the county. When Johnston, as superintendent of the workhouse, with the advice and approval of his associates, employed Hall as a guard at said workhouse, he was simply acting in his official capacity as an agent of the county, and in obedience to the statutory duty placed upon him by the Act creating the board of road commissioners for said county. Hall was in no sense a servant of the defendant Johnston, and the rule of respondeat superior does not apply.

We think it is a well settled rule of law that a public officer is not responsible for the wrongful act of a subordinate employed by him under proper legal authority, unless he has directed such an act to be done, or is guilty of negligence in respect of same, which directly and proximately contributed to the injury. *Sherman & Fedfield on Negligence*, 6th Ed., Vol. 2, section 319; *Robertson v. Sichel*, 127 U. S., 507; *Bowden v. Derby*, 97 Me., 536; 63 L. R. A., 223; *Scott County v. Fluke*, 34 Iowa, 317; *Barker v. Chicago, etc., Ry. Co.*, 243 Ill., 482.

In all of the these cases it was held that public officers are not liable for the negligence of their subordinate officers, whether appointed by them or not; that the rule of respondeat superior does not apply. They are liable for their own negligence, and liability for that of their inferiors only arises where the latter are their personal agents or private servants. The exemption of a public officer from liability for the negligence of a subordinate official is said to rest on reasons of public policy.

Counsel for plaintiff, in his brief, cites a memorandum opinion of the Supreme Court in the case of *J. W. Fox, Sheriff of Knox County et al. v. G. P. Bunn et al.*, filed

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at Knoxville on November 30, 1907, which he insists supports his contention in this case that the defendant Johnston and his surety on his official bond are liable for the negligent or willful act of the defendant Hall in shooting the plaintiff. That was a case where a deputy sheriff, while acting under an appointment given him by the sheriff, G. W. Fox, shot at a prisoner, who was charged with only a misdemeanor, and wounded a bystander.

The sheriff and his surety on his official bond were held liable for the act of the deputy. This was on the ground that the deputy was the servant and agent of the sheriff, and was acting within the scope of his authority at the time he did the shooting, and, therefore, the rule respondeat superior applied.

There is no error in the judgment of the Court below, and it is affirmed with costs.

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J. M. CHAFFIN ET AL. v. A. H. JOHNSON ET AL.

1. PUBLIC OFFICIALS. *Discretion. Control thereof by Courts.*

The general rule is that where an officer or an official board is vested with a discretion as to manner, methods, etc., no Court can control that discretion or command the doing or not doing of a particular act within the official discretion.

2. SAME. *Exception. Fraud or bad faith.*

But if such officials, *i. e.*, county road commissioners, should manifest any fraud or undue bias or bad faith, their conduct, past and future, might be subjected to judicial review and control.

3. ROAD COMMISSIONERS. *Disqualification by reason of interest.*

The fact that a road commissioner is personally interested in the laying out of a road system for his county or for his particular district is not sufficient of itself to disqualify him to act.

FROM JACKSON COUNTY.

Appeal from the Chancery Court of Jackson County.
A. H. ROBERTS, Chancellor.

M. G. BUTLER and D. B. JOHNSON for Complainant.

W. W. DRAPER and JNO. J. GORE for Defendants.

MR. JUSTICE HALL delivered the opinion of the Court.

THE original bill in this cause was filed by the complainants, who alleged themselves to be citizens and tax payers of Jackson County, Tennessee, against the defendants,

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composing the board of good roads commissioners of said county, seeking to enjoin them from building a certain bridge across Roaring River at a point known and called in the record as "Fish Trap Bluff," and to compel them to build a road on the south side of said river instead of the north side as they, in their official capacity, had determined to do.

The original bill alleges that by chapter 108 of the Acts (private) of the Extra Session of the Legislature of 1913, Jackson County was empowered to, and did issue and sell \$100,000 of bonds for the purpose of building turnpike roads in said county, and that under section 6 of said Act, which designates the roads that are to be built, 15% of the fund realized from a sale of said bonds is to be expended in building a road leading up Roaring River in said county.

By the provisions of said Act, and under which the defendants were elected road commissioners of said county, they are given full power and discretion in locating, grading, building and the improvement of said roads; that one of said commissioners owns a valuable farm on the north side of Roaring River opposite what is known as the "Fish Trap Bluff," which is located about one and one-half miles from its mouth; that defendants are about to invest a large amount of the fund appropriated for said road in the construction of a bridge across said river at "Fish Trap Bluff," which will consume at least one-half of the amount appropriated for said road, leaving a very small amount for the construction of the road at either end of said bridge; that this would be a waste of the public fund, and the people would receive but little, if any, benefit from the \$15,000 so appropriated, which would cause irreparable injury to the general public interested in said funds, and especially complainants; that the construction of

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said bridge at said point by the defendants would benefit but few people outside of the commissioner Johnson, who would be the chief beneficiary of said improvement at the expense of the traveling public.

The bill further alleges that a road can be constructed up Roaring River on the south side thereof for a distance of some eight or ten miles without crossing said river, and the fund appropriated for said road will construct the same on the south side of the river for a distance of at least eight miles, whereas, if a bridge is constructed across said river and paid for out of said fund, a road on the north side of said river could not be built reaching half that distance, and would not accommodate one-half the people that a road constructed on the south side would; that four-fifths of the population that would use said bridge would have to ford the river to get to the same in time of high water, or the erection of another bridge about one mile above the place where the present one is about to be constructed, would be necessary, in order to accommodate a large portion of the population that would want to use said road about to be constructed by the commissioners in the north side of the river; that there is an understanding between commissioners Johnson, Anderson and Cassetty, who constitute a majority of said board, to locate and build said road by, through and near their respective farms, which is not to the interest of the general public, but only serves the three commissioners and the few persons living near them.

The original bill alleged that commissioners Draper and Hall voted against the location and building of said bridge at the point where it was located by a majority of the commissioners; that commissioner A. H. Johnson, one of the commissioners who voted to locate and build said bridge at "Fish Trap Bluff," by reason of his personal interest and

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the benefit he would receive by locating and building said bridge at said point, was disqualified to act in the matter, because the building of said bridge at said point would greatly enhance the value of his farm, and, therefore, the proposition to build said bridge at the point where it was attempted to be located by said commissioners was not legally determined by a majority of the board authorized to act in the premises.

The original bill contains many other allegations, which we deem immaterial and unnecessary to set out in this opinion.

Its prayer was that, if necessary, it be filed in the name of the State of Tennessee by the complainants as relators against the defendants under section 5166 of Shannon's Code; that an injunction issue enjoining defendants from building the bridge across said river at "Fish Trap Bluff," and to require them to locate and construct said road on the south side of the river instead of the north side, as determined upon by a majority of said commissioners.

On August 10, 1914, complainants filed an amended bill, in which they alleged that the defendants Johnson and Anderson, together with the defendant Cassetty, voted for the proposition to build a bridge across Roaring River at "Fish Trap Bluff," and that Hall and Draper, the two other commissioners, voted against said proposition; that by the provisions of said Act of 1913, it is provided that 12% of the money derived from the sale of said bonds shall be expended on the "Granville and Flynn's Lick Road" from the First and Eleventh district line to Granville; that the defendant Anderson lives on the dry fork of Flynn's Creek, and owns a farm about one mile south of where said road is now located; that he and his co-defendants, Cassetty and Johnson, over the protest of the two other commissioners, have decided to change the location of

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said road so as to leave the old road at or near the forks of Flynn's Creek and run it up dry fork near said Anderson's residence and over his farm, thereby enhancing its value many hundred dollars; that the way agreed upon by said three commissioners over said farm is impracticable, if not impossible, with the limited amount of means appropriated for the purpose, and the defendant Anderson would be the chief beneficiary.

The amended bill further alleges that 12% of said road fund is appropriated and set aside by said Act to be expended on the road leading from Gainesboro to the Smith County line by the way of Brook's Ferry, and the present commissioners have located said road so as to cross Wartrace Creek at or near Highland, and thence across Salt Lake Creek at or near Bladdico; that there is a mercantile firm on Wartrace Creek above Highland known as Cassetty Brothers, which is owned by the brothers of the defendant Cassetty, and whose brother owns a large farm near that point, and the commissioners Johnson and Anderson have agreed with him to expend \$1,500 of the fund set apart for the building of the road from Gainesboro to the Smith County line, in building a road up Wartrace Creek near said store, which would alone subserve the interest of said Cassetty and his kinspeople; that recently the said Cassetty, Johnson and Anderson have rescinded their action locating said road so as to cross Wartrace Creek at or near Highland, and are now threatening to use the entire fund in extending the road up Wartrace Creek to said store and farm, and thence west striking Salt Lake Creek at or near Bagdad, unless said Hall and Draper will agree to vote with them for the construction of the bridge at "Fish Trap Bluff," and the building of the road over the defendant Anderson's farm and by his residence.

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The amended bill further alleges that the defendants are guilty of an abuse of the power and authority vested in them as commissioners, and that there is a fraudulent collusion between the defendants Anderson, Johnson and Cassetty to run said roads and build the bridges so as to subserve their respective personal interests without regard to the interest of the public. These are, in substance, the material allegations of the amended bill.

The bill as amended was demurred to by the defendants. The demurrer makes the following defenses:

(1) That the Act under which the commissioners proceeded vested them with the authority to locate all roads and bridges to be built, and gives them full discretion in the matter.

(2) The bill fails to allege and show any injury peculiar to complainants, which is not suffered in common by the general public.

(3) That the statute under which the commissioners were acting required each commissioner to be a resident and freeholder in certain designated sections of the county, and the mere fact that the location of said bridge at the point designated would enhance the commissioner Johnson's farm, did not disqualify him to act in the matter of locating said bridge at the point designated.

(4) That the bill, as amended, does not make out a *prima facie* case of fraud or collusion.

(5) That defendants are not subject to suit for non-feasance, malfeasance or misfeasance at the suit of a private citizens, unless it be shown by prior averments that the citizen would thereby suffer some loss or injury not common to the general public.

The Chancellor overruled the demurrer, holding that commissioner Johnson was disqualified, by reason of his

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interest in the result, to vote upon the location of the bridge at "Fish Trap Bluff," and for the further reason that the bill, as amended, made out a *prima facie* case of fraud upon the part of the commissioners, in, that they had entered into a collusion to locate and build the pikes and bridges in their respective divisions at such places as would enhance their property and confer upon them a special pecuniary advantage and benefit.

We are of the opinion that the bill does make out a *prima facie* case of fraud against said commissioners, and the cause should, therefore, be remanded for answer.

In the absence of fraud, a Court of equity will not undertake to control the action of public officers constituting a *quasi* judicial tribunal, when they are acting within the scope of their authority, in matters lawfully committed to their discretion; but where the bill alleges that such officers have entered into a fraudulent agreement or collusion to use a public fund intrusted to them in a way that will confer special pecuniary benefits upon themselves to the prejudice of the general public, for whose benefit the fund is to be expended, makes out a case for injunctive relief.

The bill in the suit at bar alleges that a majority constituting the board of highway commissioners of Jackson County, who are vested with the authority to locate and build pikes and bridges in said county, have entered into a fraudulent agreement to locate and build said pikes and bridges so as to enhance the value of their own property, and thereby confer upon themselves financial benefits not enjoyed in common by other citizens in the county, but to their detriment.

Mr. High, in his Work on Injunctions (Vol. 2, article 1025), says:

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"In discussing injunctions against public officers, it is important to observe that Courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting *quasi* judicial tribunals, such as a board of supervisors, commissioners of highway, and the like, on matters properly pertaining to other jurisdictions, nor will they review or correct errors in the proceedings of such officers.

So where commissioners of roads and highways are by law intrusted with full jurisdiction of matters pertaining to change in roads, a Court of equity will not interfere with the exercise of their discretion, unless a strong case of fraud or irreparable injury is shown. And where they have exercised their discretion and made their decision in good faith, and without any intention of injuring private persons, an injunction will not be allowed against their action, when they are acting within the scope of their authority and discretion, however impolitic and impressional may be the law under which they are acting."

This authority is quoted and cited with approval in *Pope v. Dykes*, 116 Tenn., 230.

The bill in the present case, however, alleges fraud upon the part of the commissioners, which, if true, would amount to a clear abuse of their authority and a most flagrant breach of their trust. While said commissioners have full power and discretion in the matter of locating and building the roads designated by the Act under which they are proceeding, they must exercise that authority and discretion in good faith, and not fraudulently. In other words, not in such a way as to confer upon themselves an undue benefit and advantage.

We are of opinion that the mere fact that the location of the road and bridge in question is in close proximity to the defendant Johnson's farm, and will enhance the

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value thereof, was not sufficient of itself to disqualify him from acting in the matter, provided said action was taken in good faith, and not for the fraudulent and exclusive purpose of benefiting said commissioner.

The Act itself provides that each commissioner shall be a citizen and freeholder in their respective divisions, and in the location of the roads to be constructed under said Act, some one or more of them might necessarily touch or pass in close proximity to lands owned by some one of the commissioners, and could not be advantageously located without doing so.

For the reason indicated the decree of the Chancellor will be affirmed, and the cause will be remanded to the Court below for further proceedings.

The defendants will be taxed with the costs of their appeal.

KNOXVILLE RAILWAY & LIGHT COMPANY V. N. H.
HENSON, ADMINISTRATOR.

Affirmed by the Supreme Court, at Knoxville, 1913.

1. DAMAGES FOR PERSONAL INJURIES. *Speculative cause or nature.*
Submission to jury.

If the producing cause of physical injuries be so uncertain as to necessitate speculation as to responsibility, as contradistinguished from reason or inference, the case should not be submitted to the jury. But this rule has application to the proximate cause rather than to the nature or extent of injury. For if the cause of the injury be ascertainable, plaintiff is entitled to go to the jury notwithstanding the uncertainty as to the extent of his injury.

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2. SAME. *Proximate cause. Subsequent injuries. Fatal and non-fatal injuries.*

Where the intestate of plaintiff was thrown from his buggy to a street car track and was run over by a car while lying thus and subsequently died, the question as to whether the street car company caused his death was a question for the jury. In such case plaintiff would be entitled to recovery notwithstanding prior serious injuries if the evidence tended to show that the immediate cause of intestate's death was impact from the car.

3. SAME. *Prior and subsequent injuries.*

That intestate had been previously injured and was in serious condition at the time the defendant struck him, will not defeat a recovery against defendant if the acts of the latter really and proximately caused his death. But in such case the defendant should be held responsible for subsequent injuries only. The difficulty of distinguishing the two, however, is no ground for denying plaintiff a right to go to the jury.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

SHIELDS, CATES & MOUNTCASTLE for Plaintiff in Error.

PICKLE, TURNER & KENNERLY for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THE defendant in error as administrator of one J. G. Henson brought this suit to recover damages for the alleged wrongful killing of his intestate at the hands of the servants of plaintiff in error. A verdict and judgment of \$7,500 were awarded. A motion for a new trial was made

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and overruled by the lower Court and the cause is here by appeal in error.

Counsel for plaintiff in error with his usual frankness and discriminating ability concedes liability for nominal damages, his principal assignment of error here being that the trial Judge should have granted his motion for a direction to the jury to return a verdict for such damages. The contention of learned counsel for defendant in error was and is that he was entitled to a recovery of substantial damages, that the question of proximate cause of the injuries and loss for which this suit was brought was one for the jury; that there was material evidence to support their finding of substantial damages or to justify the submission of the question to the jury, and that the verdict is conclusive. The insistence of learned counsel for appellant, restated or more amply stated, is that the questions at issue do not approach the realm of certainty or probability; that the consequences and injuries to the deceased with respect to their source and cause are purely conjectural; that no jury should be permitted to speculate as to the proximate cause, for the reason that there is a bare scintilla of evidence as to the cause of Henson's death, and that the Court should have taken from the jury the question of awarding substantial damages.

This is a singular case in many respects and it is a fruitful source of discussion. Many cases bearing upon the points were brought to our attention and skillfully applied or distinguished, and others could likewise have been cited. But we believe that the case can be determined upon well-settled and generally accepted principles.

For the purposes of this case we shall assume as against defendant in error that his intestate had by some means other than those under the control of plaintiff in error been thrown athwart the track of plaintiff in error at the

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point of contact with its machinery. The accident happened somewhere near seven o'clock of the evening of February 5, 1910, at a point on the Kingston pike line of plaintiff in error near where the L. & N. R. R. crosses. There is at this point a single track located in the center or about the center of the turnpike. On the evening of the day mentioned the intestate was driving a one-horse no-top buggy out the pike and in a southern direction toward his home. Although not definitely shown, it is so probable as to justify its assumption for juristic purposes, that an automobile which approached him from the rear ran suddenly against the rear and left side of his buggy, thus tilting it and throwing him to the ground and across the street car track. This force or some other power undoubtedly put Henson in this position. The horse was pushed or managed to drag himself, pinioned by the buggy and the harness, to the other side of the turnpike. It is uncertain as to the length of time Henson lay upon the track in a dazed condition before the car which touched his person came up, but it appears with reasonable certainty from the evidence that it was in the neighborhood of four or five minutes. While thus lying on the track a car in charge of the servants of plaintiff in error, on its way toward the city from the end of the line as it existed at that time, ran against and upon the body of Henson in a manner to be hereinafter more specifically described. It was dark. A strong headlight throwing its rays some hundred feet or more was attached to the car. The explanation given by the motorman of his reason for running against the body of Henson was that his attention was wholly engrossed by the movements of the horse and by his (the motorman's) anxiety as to whether the horse would get on to the track. For this reason he did not see or know of the presence of Henson on the track until the car had struck him.

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Henson lived some three hours after contact with the street car, but never regained consciousness. He was taken to a hospital and examined and treated by skilled surgeons, but to no avail. His body was injured in various ways, to wit, his ribs were broken, his chest crushed, his head and face scratched and skinned, a leg broken and a heel cut off, and likewise a fracture of the thigh and a compound fracture of the ankle joint and an injury to the right hand.

The question foreshadowed is whether or not there was such evidence adduced as warranted the Court in submitting to the jury the question as to whether the prior or succeeding injury was the proximate cause of the death of Henson. No authorities are needed for the proposition that if this was speculative or conjectural the Court should not have allowed the jury to guess. It is axiomatic that a wrongdoer is responsible for such injuries only as can be reasonably shown to be attributable to his unlawful acts. It is clear that if Henson before the impact of the car received injuries which caused his death as a proximate consequence, substantial damages cannot be recovered against plaintiff in error. It is likewise true that if after reviewing the whole of the evidence it is just as probable and consistent that his death can be attributed to the prior accident as to the impact of the car, there can be no recovery and a jury should not be permitted to speculate. All these propositions must be conceded. But on the other hand the Courts of this State must be careful to avoid in-trenchment upon or invasion of the province of the jury, for the jury must be treated as still possessing the juridical function of weighing the evidence and finding the facts.

Learned counsel for plaintiff in error brings to our attention quite a number of authorities bearing upon the

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question at issue and insists that they are controlling. From *Watson on Damages* he extracts the rule that where it cannot be shown with reasonable certainty that the injuries in question resulted from the defendant's acts, there can be no recovery; and if speculation or conjecture must be resorted to to determine this, the plaintiff must fail: Section 283. From 13 Cyc., 192 and 215, and 216 there are deduced and condensed the following propositions: In an action for damages which were uncertain, the burden of establishing the same or that they resulted from the acts of the defendant is upon the plaintiff. Where the aggregate damage is due to several causes and only a portion thereof is occasioned by the defendant, the burden is upon the plaintiff to show what part arose from the defendant's acts as distinguished from damages occasioned by others. In action for personal injuries the existence of a bodily hurt must not be left to mere conjecture or surmise. Before the Court submits to the jury the question as to whether certain bodily conditions are the result of the injury the evidence should show connection between the two with reasonable certainty. Other pertinent extracts are made from *Watson*, and *Thompson on Negligence*, the soundness of which cannot well be attacked. But we have reached the conclusion after mature deliberation that these rules of law are not applicable or entirely controlling when the peculiar facts of this case are brought to mind, or that if these propositions be applicable, the evidence was of such materiality and substantiality as to deprive the Court of the right to pass upon them as a matter of law.

The trial Judge in a very lucid and well-worded charge instructed the jury in substance that they must believe from the evidence that the death of Henson was proximately caused by injuries received from impact with the

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street car, and that if they were not reasonably certain of this their verdict should be for the defendant below. He further told them that if in their opinion the cause of Henson's death was conjectural or speculative, there could be no recovery, and that before they could proceed to the consideration of substantial damages they must believe from the preponderance of the evidence that Henson's death was caused primarily and proximately by injuries received from the street car company and not from the injuries inflicted prior to impact with the car.

Thus the minds of the jury were specifically directed to the question of proximate cause of the loss of Henson's life. Learned counsel pertinently says that it was the duty of the Court in the first instance to determine whether there was any evidence of that degree of certainty which should be permitted to go to the jury, and that the trial Judge could not tell the jury that it was their province to determine whether the evidence was conjectural or speculative; and there is great force in this insistent. So that at last upon the motion made for a directed verdict and upon the assignment here made, it does become the duty of the Court to determine whether the evidence was so material respecting the proximate cause and respecting the damages sought as to justify the submission of these matters to the jury.

Very much of the argument and many of the authorities presented to us by learned counsel for plaintiff in error have reference to the question as to whether a defendant has been guilty of any wrong, rather than to the question as to the *quantum* of damages which should be charged to a defendant admittedly guilty of wrongdoing. When cases of this latter nature arise the course of procedure should be looked at from an entirely different angle. It is true that the wrongdoer should not be visited with damages for

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which he is not responsible; at the same time, however, the rules of law should not be so restricted as to enable him to escape consequences for which he should make reparation. Learned counsel for defendant in error pertinently brings to our attention some extracts from Watson on Damages, to the effect that the rule against the uncertain damages has been generally directed against the uncertainty as to the *cause* rather than uncertainty as to measure or extent. That is, if the uncertainty was whether defendant's act caused any damage or whether the damage shown flowed as alleged, from the defendant's act, there can be no recovery; whereas uncertainty which affects merely the measure or extent of the injuries suffered is more leniently regarded. Inability to compute the extent of the pecuniary damage which resulted from the wrongful act is no ground for the exclusion of such information as may be had, but the wrongdoer must bear the risk, if there be any, of not reaching an exact result: page 366. The mere uncertainty of the amount of damages or inability or impossibility of furnishing the exact data from which they can be computed will not repel the plaintiff if there be sufficient circumstances to guide the jury in making a reasonable award: Watson, 290, 292, 293.

No authorities are needed to sustain the proposition that although Henson may have been severely hurt, if the car ran upon him in such a way as to injure him fatally or produce his death, a recovery may be had: *Demaet v. Packing Co.*, 132 S. W., 132. It is likewise well established that although he may have been greatly injured by the prior accident, if the street railway servants ran upon him and inflicted such injuries as can in the nature of things be looked upon as the *efficient, immediate* and *proximate* cause of his death, the company is liable therefor. When such is the case, and when there is evidence

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from which the jury might infer reasonably that the later accident and not the first was the proximate cause of the loss of life, the case should be submitted to the jury with directions to compensate for such damage as they believed from the evidence was thus sustained by the beneficiary: *Jenkins v. Railroad*, 11 Am. Neg. Rep., 469. This case, the opinion in which was delivered by Justice Pitney, is a very instructive one indeed.

Again restated, the question here is, were the fatal injuries received from the automobile impact or from the impact of the street car? Was the proximate cause of his death in the sense of the law and in fact the prior or subsequent event or accident.

We are constrained to take the view that there was material evidence from which the jury could reasonably find that the proximate cause of Henson's death was the impact from the street car rather than the prior happening. The law does not require absolute certainty. If it did, few lawsuits could be sustained. The requirement simply is to adduce such proof as the nature of the surroundings is capable of and such as raise probabilities of such strength as that reasonable men may act thereon. When facts are of this nature, or when the evidence is of such cognency as tends naturally to show causal connection between the injury and the consequences, the jury should be given the case with directions to admeasure the damages to the best of their ability and good sense, limited of course by the rule prohibiting the awarding of remote or speculative damages: *Jenkins v. Railroad*, *supra*. Whenever reasonable men in the exercise of their good judgment can find justification for a difference of view as to the facts or inferences therefrom, the question of proximate cause and of connection between the cause and consequences is one for the jury: *Morrison v. Teleg. Co.*, 69 Hun., 100.

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There are certainly to be found in this record many facts and reasons which would justify reasonable, logical, sensible men in arriving at the conclusion that the prior physical injuries received by Henson were temporary and non-fatal, and that his death can be attributed to the street car impact. Entertaining this view, it results that the trial Judge did not commit error in declining to grant the motion for a verdict for nominal damages only. Notwithstanding injury by the automobile owner, or by some one else, the street car company had no right to inflict further strokes; and in attempting to ascertain that part of the damages for which plaintiff in error can be held responsible, Courts and juries should not be too much hampered by strictness and nicety: *Swain v. Copper Company*, 111 Tenn., 430.

Affirmed.

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JENNIE S. O'BRIEN v. ST. LOUIS I. M. & SOUTHERN
RAILWAY COMPANY.

Writ of certiorari denied by Supreme Court,
at Jackson, 1915.

1. CARRIER AND PASSENGER. *When relation not created. Party going to station long in advance of train.*

A party who goes to a railway station either for the purpose of embarking or for the purpose of meeting incoming passengers is not a passenger nor an invitee when he goes to the station some one and one-half hours in advance of the arrival or departure of the scheduled passenger train.

2. LICENSEE OR INVITEE. *Due care. Sphere of operation. Stepping aside.*

A party who is at a railway station either as a passenger or for the purpose of meeting incoming passengers or to see passengers off has the right to exact reasonable care of a railway company while he is at the proper place or places, such as are customarily used or occupied by such persons; and he must also be upon the premises at a reasonable time with reference to the object of his visit. If a party has gone to a station an hour and a half in advance of the incoming of a train upon which he is expecting to meet a passenger, and of his own volition, without any necessity therefor, leaves the station rooms or platform and walks out upon the track and is injured by colliding with cars that are being moved about in switching, no recovery can be had in the absence of a showing that his presence was known.

3. SAME. *Degree of care. Lookout.*

A railway company engaged in necessary switching in and about its depot grounds is not required to keep a lookout for persons who may be walking in or around its premises unless the party be there by invitation or of right.

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4. SAME. *Licensee. License predicated upon long user of track by the public. Protest of the company.*

Where it is disclosed that a railway company has constantly protested against the using of its space in and about its depot by the public and has continually warned people to keep away, and where there is no evidence tending to show acquiescence in such use by the company for a considerable period of time, it is the duty of the Court to decide and state to the jury as a matter of law that parties on the tracks in and about the depot on missions not connected with the business of the company are not licensees or invitees.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County. Third Division. A. B. PITTMAN, Judge.

JERRE HORN and C. S. DASHIEL for Plaintiff in Error.

J. W. CANADA for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

JENNIE S. O'BRIEN, widow of Thomas J. O'Brien, and administratrix of his estate, brought this suit in the Circuit Court of Shelby County against St. Louis, Iron Mountain & Southern Railway Company, and three other railroad companies, to recover damages for the killing of her husband; the theory on which the suit is founded being that his death resulted from the negligence of the defendants, particularly of the St. Louis, Iron Mountain & Southern Railway Company, and the Union Railway Company, also one of the defendants. On issues duly made up by the declaration and pleas filed by the four defendants, each having separately pleaded not guilty and contributory

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negligence, the case went to trial before the Circuit Judge and a jury, and at the conclusion of plaintiff's testimony a motion for the direction of a verdict in favor of defendants was sustained, and the suit dismissed. Plaintiff's motion for a new trial being then overruled, she appealed to this Court, and here by her assignments of error insists that the case should have gone to the jury, and that the trial Court was in error in directing the verdict. The facts of the case are few, and practically undisputed. Briefly stated, they are as follows:

Deceased was a millwright, and had arranged for some other millwrights to meet him in Memphis. They were expected to arrive there on what is known in the record as the "Cotton Belt," the correct corporate name of which it appears is St. Louis & Southwestern Railway Company. Trains going into Memphis over that company's road went to what is called the Iron Mountain Station at Calhoun street, and the particular train on which the millwrights were expected was due to arrive there at 7.40 or 7.45 o'clock in the afternoon or evening, the witnesses differing five minutes as to the exact time it was due. Mr. O'Brien was in the city and in the neighborhood of the Calhoun street Station about 5.30 o'clock in the afternoon, and, it then being only about two hours until the train on which he expected the millwrights was due, he decided to go to the station and await their arrival; such at least were his expressed intentions when he was last seen alive so far as the record from us shows, which was about 5.30 o'clock. At about 6 o'clock, or not later than 6.10, the body of Mr. O'Brien was found on one of the railroad tracks in the yards or station grounds at Calhoun street, almost cut in two as a result of having been run over on one of the rails by an engine. No one saw the man run over, and the exact manner in which it occurred is therefore not dis-

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closed; but circumstances are furnished which discloses with almost reasonable certainty how he came to his death, which circumstances are as follows:

The yards in which deceased lost his life, according to the evidence, were used by the St. Louis & Southwestern Railway Co., the "Cotton Belt," as it is called, and by the St. Louis, Iron Mountain & Southern Railway Company, and also by the Union Railway Company, and perhaps some other railroad companies; and, under an arrangement existing among these companies, the Union Railway Company did certain switching for the others. When the other companies would pull passenger trains into the station grounds the road engines that had pulled them in would be detached and a switch engine operated by the Union Railway Company would pick up the trains and take them to the coach yards, where they were placed and later picked up for future trips. The St. Louis, Iron Mountain & Southern Railway Company had gone into the station with an engine and some coaches, four in number, at about 4.30 o'clock on the afternoon of January 19, 1911, and at about 6.00 o'clock the switch engine was attached to these coaches with a view of taking them to the coach yard. When this was done the foreman in the yards who had charge of directing the switching operations, went, in company with a helper, from the point where the switch engine had been attached to the coaches back by the side of the coaches, one going on each side, to the rear, or what was the front when they were pulled in, and there they cut off or detached the road engine and ran it fifteen or twenty feet back from the coaches, or if it was already detached, and on this question the evidence is somewhat in confusion, it was already fifteen or twenty feet from that end of them. In any event after the road engine was fifteen or twenty feet away from one end of the coaches, and the switch en-

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gine was attached to the other end, the switch engine was started forward with the coaches attached, and the road engine then proceeded to follow, keeping the same distance of fifteen to twenty feet away from the end of the line of coaches. When the road engine, going in this way, had gone about three hundred feet, the yard foreman, who was on the road engine, was notified that a man had been run over just back of where he then was. Thereupon the yard foreman and others went back to look after the matter, and found the body of O'Brien on one of the tracks as already indicated. Thereafter blood was found on a wheel or wheels of the road engine, indicating that it had run over the body of O'Brien. At the point where this body was found there was a platform extending northward and southward along by the west side of the tracks, northward and southward being the direction the tracks extended at that point. The body was found lying across the east rail of the track next to the platform, that being the track from which the train had just been taken when the body was found. The head and about one-half of the body were lying east of that rail, while the feet with the other half of the body were lying between the rails. The point on the track at which the body was found was about opposite the south end of the platform; and the evidence indicates that the north end of the most southern one of the four coaches was standing at about that point before the coaches were pulled out by the switch engine. About thirty-five or forty feet east of the track on which O'Brien was killed was another track, and it was on this other track that the Cotton Belt train was expected to come in at 7.40 o'clock, on which the millwrights were expected. It was usual for passenger trains pulling into that station to stop opposite the platform, so that it would have been natural for O'Brien to expect the Cotton Belt train to stop oppo-

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site it, and on the track still east of the one where he was run over; but, as is shown from what has already been stated, he was run over at least one hour and thirty minutes before the Cotton Belt train was due. There is also evidence that there was constant switching going on in the station grounds at and about the point where O'Brien lost his life. It is also in evidence that there was no fence or enclosure of any kind around these station yards and switching grounds, and that the yards and grounds at and about that point, which lie between Calhoun street on the north and Georgia street on the south, the point where O'Brien was run over, were to some extent used by the public as a walkway in going from one to the other of those streets; but that such use of them was over the protest of the Union Railway Company, which had control of the station grounds and switch yards. It is in evidence that the railroad companies, or the Union Railway Company, kept men there to keep the public off of the grounds. One witness offered for the purpose of showing the use of the grounds as a walkway by the public at that place says, "There was always the public going back and forth to work from Georgia street to Calhoun," and that the public generally used the yards and station as a walkway, but that witness shows that he was speaking with reference to a time that he had previously thereto worked for the Union Railway Company, without any character of indication of when that was, whether one or ten years before; nor does he so much as intimate that even then, whenever it was, the railroad companies failed in doing all they reasonably could to prevent such use of the yards or grounds, so that his testimony in no way contradicts the other testimony to the effect that the yards at that point *at the time of the killing of O'Brien* were not used in any way by the public, except occasionally, and then over the protest of the rail-

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road companies which used the yards. That the railroads did protest against, and use all reasonable efforts to stop, such use is absolutely uncontradicted.

The road engine which ran over O'Brien was running backwards, or with the tender in front, and there was no one on the tender in position to see O'Brien on the track, and there was no light on the tender except a red light. The yard foreman and his helper were on that engine and were looking in the direction in which the engine was going, but because of the darkness could not see the yards at that point, and if they had been lighted could not have seen the track where deceased was run over because the tender would have obstructed their view of the track at a point so near them. The bell of the engine, however, was ringing at the time the engine passed that point.

Now, it is insisted by plaintiff in error that the fact that the public was permitted to use the railroad tracks as a walkway, or that it was known that the public did so use them in the yards where deceased lost his life, imposed on defendants the duty of keeping someone on the lookout so as to guard against such accidents as the one that happened; and that the failure to have someone on the lookout, or to adopt some means of safeguarding those who might appear on the track was such negligence as that the question of liability should have been submitted to the jury. It is further insisted that as deceased had gone to the station to meet others who were expected to arrive there on a train which used those grounds to discharge its passengers the railroad companies owed him the duty of taking all reasonable precautions not to injure him, and that their failure to exercise a greater degree of care than they did exercise was such evidence of negligence as that the case should have gone to the jury.

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In passing on the legal questions at issue it is proper to observe that under no theory of the case can O'Brien be regarded as a passenger, and it is not contended that he could be so regarded.

We are also of the opinion that the fact that O'Brien had gone to meet others who were expected on a train to arrive in one and one-half hours cannot be considered as placing him in any more favorable position than if he had not gone on such mission. By Shannon's Code, section 3065, it is provided that, "Every railroad company shall provide, at or near every town containing as many as three hundred inhabitants, a waiting room for the use and accommodation of passengers or persons awaiting the arrival of trains;" and by the next section it is provided that such waiting rooms "shall be amply commodious to accommodate the traveling public, . . . supplied with comfortable seats, and with ample heating facilities, . . . well lighted and heated," etc.; and by the next section, 3067, it is provided that such waiting room "shall be open for the accommodation of passengers at least one hour before the time for the arrival of each passenger train." These sections, as was said by the Court of Appeals of Kentucky in *Illinois Central Railway Company v. Laloge*, 62 L. R. A., 405, in speaking of a statute containing similar provisions with reference to the preparations for and accommodations of passengers, "may be regarded as legislative construction of the length of time that should be considered reasonable for the carrier to be required to look out for, and safeguard, its passengers before they have taken actual passage;" and we might add, as our statutes expressly refer to those awaiting the arrival of trains, it is not only a legislative construction of the length of time that should be considered reasonable for the carrier to look out for and safeguard its passengers, or those intending

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to become such, but for it to look out for and safeguard persons awaiting the arrival of trains, though not meaning to become passengers, which included O'Brien. If this is a correct construction of our statutes, then clearly the railroad companies were not chargeable with the duty of looking out for O'Brien or taking measures for his protection, because he was there awaiting the arrival of a train more than one hour before the train which he was awaiting was due; so that, regarding him as awaiting the arrival of a train, and as having only the rights of one so situated, we think that there was nothing in the relation he bore to the railroad companies to require a submission of the case to the jury. Of course, it is not meant that one going to a station to await the arrival of a train that is not due for more than an hour can be run over or injured with impunity. All that is meant is that the duty of actively keeping a look-out for such person at such time is not imposed on railroad companies.

Then, regarding O'Brien as having no more rights in the yards of the railroad companies, or on its station grounds, than any other person, but as there using those yards or grounds as any one else might have been, should the case have gone to the jury? And here it can be said that, as we understand the brief of counsel for plaintiff, it chiefly if not solely relies on the proposition that anyone using those grounds as was O'Brien, and injured as he was, would have had, or his representative would have had, a right of action against the defendant railroad companies.

Bearing on this question counsel for defendants cite and quote from many cases, and still others might be referred to, but the law as extracted from all the cases is so well stated in Elliott on Railroad (2d Ed.), section 1154, that we quote therefrom the following:

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"The fact that people repeatedly cross the tracks (of a railroad) at a place where there is no public right of passage does not necessarily entail upon the company any duty to treat the place as a public crossing and the fact that there are numerous trespassers and the act is committed often does not in itself relieve their presence upon the track of the character of a trespass, but situations may arise from which the company ought reasonably to foresee danger, and in such cases it has been held that the company is not absolved from ordinary care and precautions to prevent injuries. Yet, although the place is used repeatedly and frequently as a crossing with the mere silent acquiescence of the company, or with the knowledge and simply passive permission of the company, it would seem that the traveler who uses it is at most a bare licensee, who takes his license with all its concomitant risks and perils, and as a general rule, the company owes him no duty greater than that which is due to a trespasser. In order to impose upon the company the duty to treat a place as a public crossing, those who use the place as a crossing must either have a legal right to so use it, or must use it at the invitation of the company, and 'neither sufferance, nor permission, nor passive acquiescence' is equivalent to an invitation. If, however, the traveler uses a place as a crossing by invitation of the company, it must use ordinary care to prevent injury to him, as, where the company constructs a grade crossing and holds it out to the public as a suitable place to cross. . . . There is much conflict of authority as to what constitutes such a general use of a place as a crossing or such recognition of the right to use such a place as will impose upon the company the duty of observing the precaution required at public crossings, but we think the doctrine we have expressed is the true one supported by the best reasoned cases and by the recog-

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nized principles of law. The opposite view has been taken in a line of cases in which it is held that if the place has been used as a passageway for a long period of time and this use is with the knowledge and permission of the railroad company, it is its duty to treat it as a highway, and that where the railroad company licenses the public to make a general use of a crossing over its track, it cannot treat a person who walks upon it as a trespasser, but some of these decisions seem to impose upon the company a greater duty than is due to a bare licensee, and the traveler is no more than a bare licensee, unless he has a legal right to be on the track, or is there by invitation of the company."

It will be seen that, according to this authority, plaintiff made out no case to be submitted to the jury, because, even if we should apply the doctrine of those cases which come nearest supporting her contention as to her right to recover, still she could not recover for the reason that, according to those cases, the use of the railroad tracks or grounds as a passage way must have been "for a long period of time" and "with the knowledge and permission of the railroad company," while directly the opposite state of facts is undisputed in the case at bar. Here there is absolutely no evidence to indicate that either of the defendants ever in any way, either positively or passively, or so much as by implication, gave permission to the public to use the yards in question as a way of travel. On the other hand, the uncontradicted evidence here is that the railroad companies, the defendants in the instant case, used all reasonable efforts to prevent the use of their tracks by the public as a walkway, so that here there can be no invitation, express or implied, and no recognition of that right.

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It is insisted, however, by plaintiff in error that our own case of *Fleming v. Railroad*, 106 Tenn., 374, is an authority for the proposition that the case at bar should have been submitted to the jury. We are of opinion that case does not in its holding go to the extent contended. There the place where the injury occurred had not only been used by the public for a number of years, by permission, as the Court there held, but it was actually *necessary* that it be so used. These features of that case are brought out in the following extract taken from the opinion, in which we have understood certain language for the purpose of calling special attention thereto: "While the company as against a licensee as well as trespassers, is entitled to the use of its tracks when it desires to use them, still when they are not continuously in use, and persons are *allowed* to go upon them between trains, it would be incumbent upon the road to see that its tracks were clear before moving its trains over them.

"It appears that the place where this accident occurred had been used as a passing or standing place for a number of years, and *was really necessary to be so used for the accommodation of passengers and persons having business at the depot*. It does not therefore present the case of a person needlessly and heedlessly placing himself in front or rear of a car likely to be moved, and injured because the railroad had no actual knowledge of his presence."

We are of the opinion, for the reasons herein set out, that there was no error in the action of the trial Court in directing a verdict, and its judgment is affirmed.

Dunn v. McLeary.

ERNEST DUNN v. J. M. McLEARY ET AL.

Writ of certiorari denied by Supreme Court,
at Knoxville, 1914.

1. **HOMESTEAD.** *Proceeds of when voluntarily conveyed. Not exempt.*

Where the husband and wife have voluntarily conveyed in the regular way their homestead in a tract of land worth less than \$1,000, the proceeds are not exempt, nor can personal property bought therewith be claimed as an exemption under the homestead law.

2. **SAME.** *Lumber placed on homestead.*

Lumber which has been purchased and placed upon a lot claimed as a homestead is not exempt, although bought for the purpose of erecting a house thereon. Nor does such lumber become in any sense part of the realty.

3. **SAME.** *Lien on homestead by decree in equity. Not superior to wife's claim.*

A lien upon a homestead created by agreement of the husband and a creditor and made the decree of a Court of equity is not binding upon the wife nor superior to her claim of homestead.

FROM BRADLEY COUNTY.

Appeal from the Chancery Court of Bradley County.
V. C. ALLEN, Chancellor.

T. E. THATCH for Complainants.

MAYFIELD & MAYFIELD for Defendants.

MR. JUSTICE MOORE delivered the opinion of the Court.

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A HOMESTEAD question is involved in this lawsuit, and grows out of the following facts: The complainant is the head of a family and owned a small homestead, worth \$200.00, situated in Bradley County. He sold it for that amount of money, and, with fifty dollars of the cash received for it, bought two acres of vacant land not far from where his old home was located, intending to build a house on it for a home. After he bought this two acres and had a deed made to himself, he then used fifty dollars of the money realized from the sale of his first homestead, in buying some lumber with which to build a house on the vacant lot, intending to use this lumber in the construction of such house. The lumber had been bought and paid for, and was hauled and stacked on the two acres of ground preparatory to building the house on the following Monday. It was hauled and placed on the lot on Saturday before he intended beginning the work of construction on Monday following. He had employed the carpenters, and they were ready to start to work at the time stated, and were prevented from doing so for the following reasons: Two small judgments, one for \$20.00, in favor of Dr. McLeary, and the other for \$6.00, in favor of defendant Epperson, had been rendered against complainant, on which executions were issued and which were levied upon the lumber then in stack on the vacant two acres of ground on Saturday before complainant intended to start building on the Monday following; and he filed the bill in this case to enjoin a sale of the lumber under said execution, upon the ground that, when he sold his homestead for \$200.00 he intended then to buy a little more land and build a house thereon with the money he received from the sale of his home. He insists that, under the decisions of the Supreme Court, he has a homestead right, not only in the two acres of ground that he bought, but in the lumber that was on this ground

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and in payment of which he used fifty dollars of the money received by him from the sale of his homestead. There were about 3,500 feet of lumber, and it cost complainant about fifty dollars to place it upon this two acres. The executions were not levied upon the two acres of land, nor is it insisted by defendants that he does not have a homestead in the same; on the contrary, it is practically conceded that he has a homestead claim in and to the two acres of ground, but it is insisted that, inasmuch as the lumber had never been attached to the land, it was simply personal property and subject to be levied upon by execution for complainant's debts. It being the purpose and intention of complainant, when he sold the homestead, and it is insisted by him that he sold it for the purpose and intention of buying more land with the proceeds of said sale, and constructing on it a house in which to live, that he has a right to claim as a new homestead, not only the land bought with the proceeds of said sales, but the lumber he intended to use in building his house as his homestead, he cites the case of *White v. Fulghum*, 87 Tenn., 281, and the case of *Crawford v. Carroll*, 9 Pickle, 991, to sustain his contention.

In *White v. Fulghum*, *supra*, the Supreme Court held that, where a mortgage was foreclosed, a mortgagor could claim a homestead exemption in any surplus that remained after the mortgage debt was paid, and in so holding, Mr. Justice Caldwell said, "The fund realized from the sale of the land represents the land itself, and is subject to the same liens and rights; it stands in the place of the land, and those having an interest in the latter, have the same measures of interest in the former. The right of homestead existed in the land and was subordinate alone to the incumbrance of the mortgage; so it exists in the fund, subject alone to the prior satisfaction of the mortgage debt."

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Counsel for defendants concede the correctness of the rule stated in *White v. Fulghum*, but contend that it has no application to the facts of this case, for the reason that this is a voluntary conversion of the homestead land into money by the homestead claimant himself, while in *White v. Fulghum*, the conversion was involuntary; and they insist the same rule does not apply where the exempt property is voluntarily sold by the claimant, and converted into money by himself. It is also insisted by learned counsel for defendants that, in *Crawford v. Carroll*, it was an involuntary conversion of the exempt property into money, and for that reason it was held that the money represented the exempt property and stood in its place, and could not be reached by a judgment creditor. Learned counsel for defendants, however, insist that, where the homesteader voluntarily and of his own motion converts the exempt property into money, and then invests the fund in property not exempt from execution, such property is subject to levy and sale for his debts; and we think this contention a sound one, otherwise the claimant of exempt property could sell that which was exempt of one class, and invest the proceeds in property of a different class, when he already had an exemption in the latter class of property, and in this way claim as exempted property of a certain class more than the law allows him. To illustrate: The claimant could convert his exempted horse into money, and, having at the time, all the hogs exempt by law from execution, invest the proceeds of the horse in other hogs to the number allowed to him under the statutes, and thereby have a double exemption. Or, he might invest it in property not exempt at all under the law, and thereby claim such property as exempt from execution when in fact the statutes did not exempt it.

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It appears in this case, that after this bill was filed, under some kind of an arrangement, complainant was permitted to use this lumber in building him a house on the vacant two acres of ground, and when the cause was finally heard, the Chancellor dismissed the bill, taxing complainant with all the costs, and it is recited at the close of his decree, as follows: "It appearing further that, by agreement of parties, complainant was allowed to use said thirty-five hundred feet of lumber of the value of fifty dollars, . . . in the construction of a residence on the tract of land owned by complainant situated in Bradley County, Tennessee, near the town of Charlestown, and containing two acres more or less and being the land conveyed to complainant by J. F. Cleveland and wife, . . . that said defendant should have a lien on said real estate and improvements for the value of said lumber in case it was held in this cause that complainant is not entitled to hold said lumber as exempt property, and it is therefore ordered and decreed by the Court that said defendants McLeary and Epperson and brother, are entitled to a lien on said real estate and improvements to secure payment of the judgments heretofore rendered by W. F. Barrett, . . . and unless said judgments are paid within sixty days after the rendition of this decree, said defendants may proceed to enforce said lien to satisfy said judgments, either by petition in this cause, or by other proceedings as defendants may be advised."

While this part of the decree recites that the facts stated therein appear "By agreement of parties," there is no such an agreement in this record. Even if it appeared herein and was fully set out in the record, the Chancellor would have no jurisdiction to grant defendants such relief as he has given them in the closing paragraph of his decree. Such an agreement is nowhere referred to in defendant's

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answer, and no relief of the kind granted them, is asked therein, or by cross bill. About the close of the answer it is stated: "Defendants are further advised that the mere fact that the lumber may be used in constructing a house cannot render the same exempt from execution before it has been so used, although, if the house is constructed, complainant may have a right to homestead in the real estate and improvements."

If defendants have, by a simple agreement with complainant, permitted him to use the lumber involved in this suit, in constructing a house on the two acres of land bought by him for a homestead, then it seems to us that they have lost any right they may have acquired in and to said lumber, by virtue of the levies of their executions on it. When this question was argued before the Court, the writer of this opinion had an impression that perhaps lumber bought with the funds of exempt property and then placed on land which was exempt as a homestead, might become a part of such homestead as a fixture; or in other words, it might then be claimed as a fixture, and as such, not subject to the levy of an execution on it.

This question, however, was settled in the case of *Blue v. Gunn*, 114 Tenn., 415, 418, in an opinion delivered by Mr. Justice McAlister, where it was held that, "Finishing material for a building, such as doors, mantels, casings, etc., not expressly made for the building, and available for use in any building, and deposited in a house which was covered by a deed of trust, for the purpose of annexation thereto, but in no way attached to the house, and not mentioned in the trust deed, would not constitute such fixtures as would pass to the purchaser of the property on a foreclosure of such deed of trust." In the opinion a fixture is defined as "An article which was a chattle, and which, by being physically annexed or affixed to realty, becomes

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accessory to it and a part and parcel of it," that annexation is the controlling element in the very definition of a fixture; that the great weight of authority in this country is, that physical annexation to the realty is necessary in order to render a chattle a part of it.

Under the holdings of this case, this lumber could not in any sense be termed a fixture, or a part of the realty, for the reason that it was never physically annexed, or attached, to the land in question; and in order to become a part of the realty, and therefore a part of the homestead and exempt from sale under execution, there must not only be an intention to annex it to the realty, but there must be an actual, physical annexation of it to the land. This holding of the Supreme Court settled against complainant the impression the writer had at the time the case was argued. We are of the opinion that complainant cannot claim this lumber because it was bought with the proceeds of his homestead property; nor can he claim it as a fixture because it was never physically attached to the realty.

After this lumber was used in the construction of a building on this two acres of land, it did then in fact become, under the holding of *Blue v. Gunn, supra*, a part of the realty. Under the statute, a homestead may be claimed in vacant lands. It is not necessary that the homesteader should live on his homestead in order to claim the benefit of the exemptions. When complainant bought the two acres, he bought it for the purpose of owning and claiming it as his homestead, and it was exempt as such when this lumber was stacked on it. After this suit was instituted, if the defendants agreed for him to use this lumber in building a house on his homestead, they then agreed that he might so attach it thereto as to become a part of the homestead; and when he did use it for building a house, the lumber then became a part of his homestead

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which was then exempt from sale under execution, attachment or other judicial process.

The Constitution of Tennessee, Article 11, section 11, provides that "A homestead in the possession of each head of a family, and the improvements thereon, to the value, in all of one thousand dollars, shall be exempt from sale under legal process during the life of the head of the family."

The Act of 1879, chapter 171, sections 1 and 2, provides that such homestead, "Shall be exempt from execution, or attachment, or sale, under legal process, during the life of such head of a family, and it shall inure to the benefit of his wife and children."

The Constitution in the section and article cited, also provides, "Nor shall said property be alienated without the joint consent of husband and wife, when that relation exists."

The Act cited, *supra*, provides, "Said real estate may be sold by the joint consent of husband and wife where that relation exists, to be evidenced by conveyance duly executed as required by law for married women."

The Constitution also provides that, "This exemption shall not operate against public taxes nor debts contracted for the purchase money of such homestead, or improvements thereon."

The Act of the Legislature cited makes a like exception.

It is not claimed that the debts complainant owes the defendant were created for the purpose of this land, or for the improvements that were made on it; and, therefore, they cannot claim the right to have the land sold for the payment of their debts for these reasons.

It has been repeatedly held by the Supreme Court that, where the relation of husband and wife exists, as it does exist in this case, the homestead can be conveyed only by

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the joint deed of husband and wife with her privy examination duly taken. 15 Pickle, 522.

In regard to personal property that is exempt by law from sale under an execution or attachment, or other judicial process, the Supreme Court, in 2 Coldwell, 283, held that the head of the family may sell, mortgage, or exchange the exempt property; yet, he cannot consent to its sale under a judicial process, for the reason that he holds it in trust for the benefit of his wife and children.

In 10 Pickle, 652, the Court decided that the head of the family could not, by a written agreement, waive the benefit of the exemption laws, and agree, before the property is levied upon, that he would waive the benefit of such laws. This holding was sustained in 2 Shannon, 542.

In 2 Shannon, 431, it was decided that, where the husband alone conveyed the homestead, his conveyance did not operate to defeat the homestead rights of himself and wife.

In 108 Tenn., 426, it appears that the husband and his minor wife joined in a deed conveying their homestead, and afterwards they filed a bill setting up a homestead right in the land, and the Supreme Court held that when she joined in the deed, it had no more effect, on account of her minority, than if she had not signed and acknowledged it, and allowed them to claim homestead in the land.

In 105 Tenn., 694, it appeared that the homestead was involved in litigation, and that the head of the family, whose wife was dead, employed an attorney to defend the suit brought to sell the homestead land. He also filed a cross bill in the case for the homesteader to recover it, and succeeded in the litigation in both cases. The head of the family, who had two minor children living with him on the land at the time, agreed that a fee of one hundred dollars was reasonable to the attorney for his services in the case, and a lien was declared on the homestead to se-

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cure the payment of this fee? A year or two after this, lien was declared, the attorney filed his bill to enforce it against the homestead, and the Supreme Court held that, inasmuch as the head of the family agreed to the amount of the fee, and that the lien was declared in the same decree, the attorney had the right to have the land sold to enforce the lien, to pay the attorney's fee.

In *McBroom v. Whitefield*, 108 Tenn., 426, an attorney sought to have a lien declared on the homestead involved in that case, to secure the payment of his fee for services rendered to the head of the family in recovering the homestead for the husband and wife. Mr. Justice Caldwell, who delivered the opinion of the Court, said, "It," meaning the homestead, "is exempt absolutely from sale under legal process, in any way, at the instance of any creditor, except for public taxes and debts due for purchase money or improvements. The exemption does not include attorney's fee; consequently the homestead cannot, by legal process, be sold for their payment; and it would be folly for the Court to undertake to fix a line on property that could not be sold to enforce the lien in case of default. Indeed, the exemption from sale for such a debt necessarily precludes the Court from declaring a lien therefor. To validly incumber a homestead of husband and wife with a lien for liabilities other than those embraced in the exemption found in the fundamental and statutory law, the same formalities must be observed as in case of voluntary sale thereof by them; that is, it must be done by their joint consent, evidenced by proper instrument of writing executed by them and privily acknowledged by the wife."

It is not pretended in this case that the agreement referred to in the Chancellor's decree, was ever in writing: for all that appears, it may have been the agreement of counsel for complainant. Under the decision in *McBroom*

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v. *Whitefield, supra*, the only way a lien could have been legally fixed on the two acres of land claimed by complainant as a homestead, for the value of the lumber levied upon and subsequently used in building the house on the lot, was by the "joint consent, evidenced by proper instrument of writing, executed by the complainant and his wife and her privy acknowledgment to it taken as is provided by law." There is not only no pretense that the lien declared by the Chancellor in this case, was created by an instrument of writing, but there is not even a suggestion that such writing was signed by the husband and wife, and her privy acknowledgment taken thereto.

We are of the opinion that a lien on complainant's homestead, which consists of two acres of land and the improvements thereon, less in value than five hundred dollars, cannot be created by the mere acknowledgment of the head of the family; nor can it be validly created by a decree of the Court. It can only be done by an instrument in writing executed and acknowledged by the husband and wife as provided both in the Constitution and the statutory laws of the State. It therefore follows, that we think that the decree of the Chancellor had no effect as a declaration of the lien in favor of the defendants to secure these small judgments they hold against the complainant. By agreeing for the complainant to use this lumber in building a house on these two acres, and when he used it for that purpose, they lost all rights they had in and to the lumber. It then ceased to be a chattle and became a part of the homestead realty and, as such, exempt from sale under execution, or attachment, or other judicial process. It results that, insofar as the Chancellor sought to declare a lien on these two acres of land in favor of the defendants to secure their small judgments, he was in error, and such decree is set aside and annulled. His decree dismissing com-

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plainant's bill must be sustained, and the parties are left where they were before they attempted to collect their judgments by levying upon the lumber stacked upon complainant's land which he claims as a homestead.

The costs of the lower Court will remain as adjudged by the Chancellor, but the defendants will pay two-thirds of the cost of the appeal, and the complainant one-third of it.

KNOXVILLE RAILWAY & LIGHT COMPANY V. HARRY
PAYNE, BY NEXT FRIEND.

Affirmed by Supreme Court, in Knoxville, 1914.

1. INSTRUCTIONS TO JURY. *Negligence. Invading province.*

Ordinarily, the question as to whether certain conduct was or was not negligent is for the jury to determine on a proper instruction. But when there can be no doubt as to the existence of the facts and as to the conduct of the party constituting negligence, the Court may so instruct the jury.

2. CARRIER AND PASSENGER. *Wanton or negligent conduct subsequent to wrong-doing by passenger. Ejection.*

A carrier is responsible in damages for the wanton or negligent conduct of its conductor in mistreating or handling a passengers who has been knocked senseless by the conductor because of such misconduct, although conduct of the passenger justified the conductor in assaulting and beating him. He had no right to drag the passenger roughly from the car and place him in the sun and in the dust alongside the track. In such case the prior conduct of the passenger was no justification for the subsequent conduct of the conductor in roughly ejecting the passenger and dumping him to the ground.

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3. INSTRUCTIONS TO JURIES. *No relevant evidence.*

An instruction to the jury where there is no evidence calling for it will ordinarily be treated as a harmless abstraction.

4. SAME. *Instructions as to right of jury to infer unfitness of servants. Carrier and passenger.*

An instruction that the carrier may be held liable to a passenger if it has placed its cars under the control of unfit men is not erroneous or even abstract simply because there is no other evidence than that furnished by the conduct of the servants at the time of battery committed upon a passenger, as the jury might infer unfitness from this alone.

5. DAMAGES EXEMPLARY. *When not allowed by jury.*

When it can be seen that the jury did not render any other than compensatory damages, an assignment of error that the damages are excessive because exemplary damages were allowed must be overruled.

FROM KNOX COUNTY.

Appeal in error from Circuit Court of Knox County.
VON HUFFAKER, Judge.

SHIELDS & CATES for Plaintiff in Error.

MAYNARD & LEE for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

HARRY PAYNE, suing by next friend, Patrick Spriggs, brought this suit in the Circuit Court of Knox County against the Knoxville Railway & Light Company, to recover damages for personal injuries alleged to have been inflicted on him by a motorman of that company. He alleges in his declaration that, without fault on his part,

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the motorman or conductor, or both, carelessly, wantonly, unlawfully and maliciously assaulted him and hit him over the head and face with an iron crank or bar until he was rendered unconscious, and then took him from the car with great force and violence and threw him to the street, where he was left bleeding and unconscious; and alleges further that the motorman and conductor were unfit and unsuitable persons to be on the car in the capacity in which they were employed, and that defendant knew of their unfitness, or should have known thereof, and carelessly and negligently left them on the car. On a plea of not guilty filed by defendant the case went to trial before the Circuit Judge and a jury, and verdict was rendered and judgment entered thereon for \$300.00. The Railway & Light Company appealed and has assigned errors.

The assignments are all directed at the charge of the Court to the jury, and in order to intelligently consider these assignments it is necessary to make the following further statement with reference to the facts.

Harry Payne, a negro, in November, 1912, embarked as a passenger on a street car in the city of Knoxville, meaning to go to his home or boarding house situated on what is known as the Lonsdale line. He paid his fare and took his seat in the rear of the car, the portion set apart for the colored race under the law and a rule or regulation of the street car company. His intention was to alight at Clinton street, which appears to have been a considerable distance from the point where he embarked. After keeping his seat for a large portion of the distance he got up and went to the front of the car and spoke to the motorman about letting him off at Clinton street. The motorman replied that they were not at Clinton street, the car then being in fact several blocks, perhaps a mile, from

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that point. The motorman told him to go back and set down and he would let him off at Clinton street. Payne declined to go back at the suggestion, and declared his intention to ride in the front of the car where he was when talking with the motorman. The motorman then told him that he, Payne, would have to get off or go back and set down, and opened the door ready for him to get off. Payne still declined to do either, but finally turned as if to go back to the rear of the car. On these facts there is but little, if any, controversy, but there is much controversy as to what Payne said to the motorman during the conversation just referred to, some of the witnesses testifying that Payne cursed in connection with his statement that he was going to ride in the front of the car, and called the conductor a vile name, while other witnesses testified that they were in a position to hear what was said, and that they heard no such language. There is also much conflict as to what occurred just as Payne turned to go back to the rear of the car. Payne swears that just as he turned to go back he was struck with what he supposed was a controller, or, in any event, with a hard metal substance, the lick being across the nose and face, and knocked unconscious. And, according to his statement, and the statement of the witnesses who corroborate him, no demonstration was made by him toward the motorman. On the other hand, the motorman and a number of witnesses say that after Payne turned as if to go to the rear of the car and had taken two or three steps he turned back toward the motorman and made one, two or three steps in that direction, and threw his hand to his hip pocket as if to draw a weapon, and made some remark to the motorman, again calling him a vile name, when the motorman immediately struck him with what is called the door handle or lever, a metallic bar some ten inches long, and felled him to the

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floor in an unconscious condition; and the motorman swears that he struck him because he thought Payne was going to cut him or shoot him, the motorman saying that if he had not so thought he would not have hit him. As to what occurred after Payne was struck there is very little conflict, the facts being that the motorman took Payne by the feet or heels, as the motorman himself says, and dragged him out of the street car and down the steps, and onto the street and there left him lying between the street car track and the curb, and got back on his car and went on his run. The motorman himself says that he dragged him out of the car "just like he had been a dead dog or something." It is also undisputed that Payne was bleeding when he fell to the floor of the car, and when dragged out, and continued to bleed when left in the street. After the motorman got back onto his car he inquired if Payne had left anything on it, and when told that he had left his hat, he, the motorman, picked up the hat and threw it out through the door. Also when he stepped back into the car after dragging Payne out, some women in the car were making some demonstrations when he said, according to one of the witnesses, "Don't get scared, this is all over;" but, according to another witness, he said to one of the ladies, "Be quiet, lady, we will go on through." In any event, it is undisputed that he showed no disposition to be himself excited, and went on about his usual business. After going some distance he got off and telephoned to the police department, and suggested that they get the young man, in response to which, or in response to other information, two policemen went to the scene and there found Payne still lying unconscious in the street.

There is also much controversy as to whether Payne was drinking or not. He admits that he had drunk a glass of whiskey and a glass of beer, and says that he was feeling

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sick, but that he was not drunk, and other testimony corroborates him in the statement that he was not drunk. On the other hand, the motorman swears that when he appeared in the front of the car he pushed up against him, the motorman, and acted as if drunk, and smelled of whiskey, and in this he is corroborated by several witnesses.

The first assignment of error complains that a portion of the charge of the court in which the jury was told, in effect, that if, under the circumstances, the act of the motorman in striking Payne, was justified the defendant company would be relieved of liability therefor, but that if the blow rendered Payne unconscious so that he could do no harm to passengers and persons on the car, and "if while in such state of unconsciousness plaintiff was dragged from or put off of said car by said motorman and left lying unconscious and unattended, upon the street, then, notwithstanding the fact, if it be a fact, that the injury in the first instance was justifiable upon the part of the defendant and said motorman; that is, the blow which felled plaintiff to the floor of the car and rendered him unconscious, the act of thus putting plaintiff off of the car and leaving him unconscious and unattended upon the street, if such be the fact, would constitute such negligence upon the part of the defendant, acting through its employes, as would render it liable in damages, if any directly and proximately resulted from same."

The criticisms of this portion of the charge are, first, that it was equivalent to telling the jury to return a verdict in favor of the plaintiff below; and, second, that it invaded the province of the jury in that it denied defendant below the right to determine whether the place where Payne was ejected was a proper or improper place, and whether the manner of putting him off was reasonable or unreasonable; third, that it had the effect of denying

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the right to put Payne off the car; and, fourth, that it denied defendant below the right to have the jury determine whether in so acting the motorman was acting within the scope of his employment. We are of opinion these criticisms of the portions of the charge set out are not well based. While it is true that there was no dispute as to the manner in which Payne was put off the car, and in that sense the charge in a measure was equivalent to telling the jury to return some verdict, the amount to be returned was left entirely to the jury, the direction being that the amount would be such as directly and proximately resulted from that act; and it can here be said that, just following the language set out the jury was instructed further as follows: "If you find that defendant was negligent in the manner of putting plaintiff off of the car and leaving him unconscious and unattended upon the street, and at the same time find that the act of the said motorman was justifiable, the damages recoverable in such event will be such as directly and proximately resulted from same, and not such as resulted from the blow which felled him to the floor of the car."

While it is true that ordinarily the question of whether the place where a passenger is ejected is a proper or improper place is one for the jury (Moore on Carriers [2d Ed.], page 1428), yet under the special facts of the instant case we are of opinion that there could be no doubt about the place where Payne was put off being an improper place. That it is improper to put one who has been rendered unconscious off on the traveled portion of a public street, at night, and leave him unattended, is, in our opinion, not a debatable question. It is too evidently an improper place to admit of doubt. Nor do we think the language used had the effect of denying the right to put Payne off. The questions were the manner of his being put off

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and the place where he was put off, and not the fact that he was put off.

It is said, however, in this connection, that Payne was not in position to complain at the act of the motorman in ejecting him in the manner already set out and leaving him at the place where he left him, for the reason that, by his own conduct, he had incapacitated the motorman from discharging his duties in a proper manner, and that his position, after so incapacitating him is analagous to one who has disturbed the working of machinery and is injured because of such disturbance; and *City Electric Railway Co. v. Shropshire*, 101 Ga., 33, is relied on in support of the contention. That case does hold, in a very able and interesting opinion by Chief Justice Lumpkin, that where one unfits the servant of another, a street car conductor in that case, for the discharge of his duties, and suffers as a result thereof, he is not in a position to complain; the Court in that case, among other things, saying:

"It could not be seriously contended that a person who wilfully or capriciously tampered with important mechanical appliances provided by the company for use in the running of its cars, thereby getting the same out of order so that they became incapable of properly performing their office, would be heard to assert that the company failed in its duty to guard him against danger, if, in consequence of his own wrongful act in thus placing it beyond the power of the company so to do, there followed a catastrophe from which he received injury. This being true, still less has a passenger or any one else the right to 'tamper with,' or get out of proper working condition, a fellow creature whose brain and muscle and heart are most essential agencies in his employer's service. Though there is to some extent a notion to the contrary, we are firmly of opinion that a railway conductor is, in common decency, if not in

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law entitled to some degree of respect and consideration at the hands of those with whom his duties bring him in contact. But even if it were otherwise, and for the sake of the argument conceding the absurd proposition that the general public has a right to regard and treat him as a mere machine, every one must be held to do so at his own peril; for the general public is bound to take cognizance of and warning from the widely known fact that, under the laws of nature by which such a 'fearfully and wonderfully' constructed 'machine' is governed, however harmless it may be when handled in a proper and legitimate manner, it may nevertheless become an instrument of more or less danger when wrongfully subjected to outrageous and inexcusable misuse.

"Under such circumstances as are detailed in the first head note, it would not reasonably be expected that the average conductor would remain a nicely-adjusted, well-regulated and passive functionary; and it follows that the company would not be legally responsible for the consequences of its conductor, thus goaded into a state of excitement, exasperation and resentment, should himself do wrong by resorting to great and unnecessary violence; provided, of course, that the insult and abuse to which he was subjected were of such a nature as naturally to excite his passions and render him unfit to perform in a proper and lawful manner the duty he owed his master and the latter's patrons. One who voluntarily, and by his own misconduct, places it beyond the power of a master to protect him, surely cannot complain of an omission to do so. Especially is this true where he practically invites the master's servant to disregard and abandon his official duties and enter into a personal encounter on his own account and upon his individual responsibility."

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We are of opinion, however, that the holding in the Shropshire case, just quoted from, has no application in the case at bar, because of the wholly dissimilar state of facts. In the Shropshire case, as stated in the head-note referred to in the quotation just made, a conductor undertook to expel from a car one who was not entitled to ride thereon and who had refused to alight, and challenged the conductor to attempt to put him off, and then committed a violent assault upon the conductor upon his proceeding in a lawful manner to make the expulsion. In response to the attack the conductor resented with unnecessary violence, the violence consisting, as is shown by the opinion, in kicking the intruder. In that case the unnecessary force used by the conductor was a part of one continuous transaction in which the conductor had been unnecessarily assaulted by the intruder and where the intruder had not in any sense been disabled. In the case at bar, on the contrary, Payne had been knocked into unconsciousness and had necessarily ceased the assault as was apparent to the motorman, and while lying bleeding and wholly disabled he was dragged out of the car, his head bumping as it went out and down the steps and onto the street, and there left in a place that exposed him to the greatest danger, and that, too, when the motorman displayed all the traits of being perfectly cool and not acting under the least excitement. We think the rule applicable here is announced and applied in the case of *Mahoney Valley Railway Co. v. DePascale*, 70 Ohio State, 179, 185, where it is held that provocation on the part of the injured intruder will not excuse the railway company from actual damages. We do not mean to hold or intimate that the Shropshire case is unsound on its facts, but only that the facts of that case and the case at bar are so widely different that it has no application here. Nor is it meant to intimate that the

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motorman had no right to put Payne off the car. The question at issue is the manner of his doing so.

It is next complained that the trial Court charged the jury that if the motorman and conductor were unfit and unsuitable persons to be in charge of the car to the knowledge of the railway company, and the railway company still retained them in its service it would be a ground for recovering such damages as resulted from such cause, the ground of the complaint being that there was no evidence of the unsuitableness of these employees. True there was no evidence of the unsuitableness except such as was furnished in the instant case, but the Court confined the right to recover for unsuitableness to damages that might flow therefrom, and, under the facts of this case, we think that could not be misleading, as the jury in no event could have understood it to mean more than a recovery for the conduct of the motorman for his manner of leaving Payne on the street unattended. In other words, under the facts of this case, we think the jury could not have been lead to award damages not otherwise properly recoverable.

Another complaint is that the Court committed error in charging the law as to exemplary damages; and it is also assigned as error that the amount awarded was so excessive as to indicate passion, prejudice and caprice. We think these assignments not well made. According to the testimony of a physician called by the Railway & Light Company, Payne was seriously injured, the lick producing concussion of the brain. It is also shown that he was in the hospital for eight days, and wholly disabled from work for five and a half weeks; that he suffered much from his injuries; that he was earning \$7.00 a week; and that his physician's bills amounted to \$44.00. Under these facts we think a verdict of \$300.00 shows conclusively that the doctrine of exemplary damages did not enter into

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the consideration of the jury; that no amount was allowed in excess of actual damages, and that therefore these assignments should be overruled.

As to the suggestion made in the brief of counsel for the Railway & Light Company that no damages are shown to have resulted from the manner of ejecting Payne and leaving him on the street unconscious and unattended, we think this untenable. Although he had been rendered unconscious he was still entitled to be taken off the car in a proper manner and left in a proper place, and he is no less entitled to damages because of the manner of his ejection and the place left than if he had not been previously rendered unconscious by the motorman.

In what we have said herein we have treated the case just as if the verdict and judgment had been altogether on what occurred in ejecting Payne and leaving him on the street, and this for the reason that the assignments require such treatment of it. It can be here remarked, however, that if the jury believed defendant and his witnesses there was a substantial basis for recovery for the assault committed on Payne which felled him to the floor of the car and rendered him unconscious. As to what theory the jury based its verdict on is not shown and not material.

Finding no error in the matter complained of, the judgment of the trial Court is affirmed, with costs.

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E. W. BRYAN V. S. R. PURNELL.

Writ of certiorari denied at Nashville, 1914.

1. **REAL ESTATE BROKER'S COMPENSATION.** *Transaction variant from original term. Scheme to defeat.*

A land owner who has listed his real estate with a broker for the purpose of securing a purchaser cannot defeat the fees or commission of the latter by himself taking the negotiations out of the hands of the broker or by entering into a slightly different arrangement and sale when the agent had produced a purchaser and had virtually induced the sale, especially when the landowner enters into new negotiations for the avowed purpose of defeating the broker's claim to compensation.

2. **SAME.** *An exchange a sale in the sense of agreement to pay commissions.*

Where a real estate broker is entitled to commissions on a sale of real estate, and the land is disposed of by an exchange for other realty and a certain amount "to boot," he is entitled to commission to be estimated upon the whole value of the property.

FROM WILSON COUNTY.

Appeal from the Chancery Court of Wilson County.
J. W. STOUT, Chancellor.

H. S. STRATTON for Complainant.

E. E. BEARD for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

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E. W. BRYAN, a real estate agent, brought this suit in the Chancery Court of Wilson County against S. R. Purnell, to recover an amount alleged to be due him as commissions on a sale of real estate. Purnell answered, denying liability. Proof was taken by both sides to the litigation, after which the case was tried before the Chancellor, with the result that the issues were found in favor of complainant and a decree rendered thereon for \$750.00. Defendant appealed, and assigns errors, insisting that no decree should have been rendered against him—that he was not and is not indebted to complainant in any amount.

The material facts and contentions of the parties are these: On March 3, 1913, Mr. Purnell, the defendant, signed a paper-writing authorizing complainant, Mr. Bryan, to negotiate a sale of a certain tract of land then belonging to Purnell, estimated to contain five hundred and twenty acres, listing the property at \$80.00 per acre, and agreeing to pay a commission of two and one-half per cent upon that price "provided you (Bryan) sell or furnish me, either directly or indirectly, name of party to whom I may sell;" and providing further, that "If I sell or offer for sale for less price than listed I herewith agree to pay commission as if sale was made by agent;" and, according to the contract, commissions were made due and payable when the sale was made under its provisions. This contract was to be in force for twelve months from its date. After the contract was entered into Mr. Bryan, the agent, put forth efforts to find a purchaser for the property, taking men on the farm and showing it to them, and corresponding with other prospective purchasers, and spending some money in advertising the property for sale. Among the parties he negotiated with as prospective purchasers was a Mr. Prowell, but Mr. Prowell indicated that he would not pay exceeding \$60.00 per acre for the lands.

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Mr. Bryan communicated with Mr. Purnell in regard to having Mr. Prowell look at the farm with a view of purchasing at \$60.00 per acre, but never at any time was told by Purnell that he would sell at that price. At the time Bryan began trying to sell Purnell's farm to Prowell, Prowell owned another farm, which it appears he desired to sell. After these efforts had been continued by Bryan to sell to Prowell the Purnell farm, but without effect, because of the price at which it was listed with him, Prowell sold his farm to one Baines at the price of \$25,000.00. That sale was made in August, 1913. Baines and Purnell were brothers-in-law, Mrs. Baines being a sister of Mr. Purnell. After Baines had bought the Prowell farm, and in October, 1913, which, it is seen, was still within the year that Bryan had in which to find a purchaser for the Purnell lands, Mr. Purnell and Mr. Baines made a trade by which they exchanged lands. Baines and wife deeded the lands that Baines had bought from Prowell to Purnell, and Prowell and wife executed a deed conveying to Baines the lands listed with the agent, Bryan. Baines and wife thereupon, on the same day, conveyed the land that had just been deeded to them by Purnell to Prowell. In fact, Prowell, Baines and Purnell were all present when these last trades were negotiated and agreed upon, and it was arranged between Baines and Prowell, before Purnell and Baines exchanged farms that Prowell would take the lands that Baines was to get from Purnell at the price of \$30,000.00, and he did take them at that price. The exchange of lands between Purnell and Baines was not an even exchange, or an exchange of one for the other, but Baines, in addition to conveying his lands to Purnell, gave him \$2,500.00 "to boot," as the parties express it. So it is seen that by virtue of these various deals Prowell, the man that Bryan, the real estate agent, at-

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tempted to sell the Purnell lands to, became finally the owner of those lands, and Purnell became the owner of the Prowell lands, all within the life of the contract Purnell had entered into with the real estate agent, but Purnell had not conveyed directly to Prowell and Prowell had not conveyed directly to Purnell, each having conveyed to Baines and received a deed from him.

Now, it is the contentions of Bryan, the real estate agent, first, that the conveyance by Purnell to Baines and from Baines to Prowell were simply means resorted to by Purnell and Baines for the purpose of defeating the payment of his, Bryan's commissions; and that, the transactions being thus colorable, he should be treated as having made the sale of Purnell's lands and awarded commissions therefor; second, that in any event the exchange of lands between Purnell and Baines in which Baines received \$2,500.00 "to boot" was a sale by Purnell within the meaning of the contract between him, Bryan and Purnell, at less than \$30,000.00, and that therefore he should be allowed commissions under the provisions of the contract to the effect that if Purnell sold for less than \$80.00 per acre he would pay Bryan two and one-half per cent commission; and we are of opinion that in either view of the case the decree of the Chancellor should be affirmed.

The evidence discloses that at the time the trades were agreed on by virtue of which Purnell got the lands that Baines had previously bought from Prowell and Prowell got the Purnell lands there was a suggestion that Purnell simply deed directly to Prowell rather than first deed to Baines and then have Baines deed to Prowell, but that this course was objected to; and Mr. Prowell swears that Baines gave as his reason for not wanting that course taken that he wanted to "dodge the real estate man." Another witness present at the same time, when asked what was said

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by the parties as to the reason for making the several deeds instead of making one deed direct from Purnell to Prowell, answered by saying, "to save the real estate commission on the place, the way I understood it;" and, although Purnell and Baines deny that any such reason existed, Mr. Baines in his testimony but qualifiedly denies remarks that Mr. Prowell and the other witness swear were made, saying that he thinks something was said at the time the deeds were drawn about a real estate agent, but that it was not about "dodging" him. He explains further that Mr. Purnell had already explained to him that he, Purnell, "had taken the place away from the real estate man or ordered him not to sell further." He admits that he had thought about the effect the transactions would have on the agent's commissions. Mr. Purnell does not deny having told Baines that the land had been taken out of the hands of the real estate agent, but admits in his testimony that in fact the contract between him and the agent was still subsisting; and he says he does not remember hearing anything said about dodging the payment of commissions, and that the question of commissions did not enter his mind when the trades were being made. He explains further, however, that he considers that "an exchange and a sale are two different things," which explanation is given as his reason for not wanting to pay commissions. All parties agree, in effect, that in the transactions in which Purnell and Baines exchanged farms the Purnell farm that had been listed with the real estate agent was estimated at \$30,000.00.

Now, under the circumstances detailed, we are of opinion, first, that the Chancellor was correct in finding as a fact that the reason why Purnell did not deed or convey directly to Prowell, but conveyed to Baines and Baines then conveyed to Prowell, was to defeat the payment of

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the real estate agent's commission, and that therefore the commissions are justly due and should be paid; and, second, independent of this matter, we are of opinion that, treating the transactions between Purnell and Baines as nothing more than an exchange of real estate made without any thought or intention of defeating the payment of commissions to the real estate agent, still commissions should be held due and payable.

In Walker's Law of Real Estate Agency, section 185, is found a proposition that covers this situation. It is there said:

"Where a broker is entitled to commissions on a sale of real estate, and the land is disposed of by an exchange for a certain amount to boot, his commission is to be estimated upon the whole value of the property. *Carle v. Parent*, Montreal (Can.), L. Rep., 5 Q. B., 451."

We find nothing in the case of *Nance v. Smith*, 10 Cates, 349, specially relied on by counsel for defendant, or in any of the other cases relied on, in conflict with the authority we have just quoted, and deem it unnecessary to go into any review of those cases.

With regard to the contention that there was no consideration to support the contract entered into between Bryan and Purnell, and that therefore this suit cannot be maintained, sufficient answer is found in the fact that, after the contract was entered into, Bryan in his efforts to find a purchaser performed labor and expended money, and in those efforts had interested Prowell, the very man that in the series of trades became the owner of the lands, in their purchase. Clearly Purnell should not be permitted to place his property with the agent, see the agent put forth efforts and expend money in trying to find a purchaser, and then become a party to a series of transactions by which

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a proposed purchaser found by the agent becomes the owner within the life of the contract, and then say to the agent who first interested the purchaser that, although he (the agent) has spent his money and put forth his efforts and found one willing to buy at \$30,000.00, yet he is not entitled to commissions because there was no consideration for the contract entered into between him and the agent. He, Purnell, prevented the agent from selling to Prowell at \$30,000.00 by refusing to take that amount direct, but by a series of transactions, one of the ultimate objects of which was for Prowell to get the lands at that sum, seeks to avoid the payment of commissions. This he cannot do. Bryan did, indirectly, if not directly, furnish the purchaser who by the series of transactions got the lands at the price he was willing to pay when Bryan approached him, and under the terms of the contract he is entitled to commissions. In no view of the case can this conclusion be avoided.

There is no error in the decree of the Chancellor, and it is affirmed, with costs.

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JOSEPH ROSENBAUM V. ED HERRON.

Affirmed by Supreme Court, at Knoxville, 1914.

1. ATTACHMENT ACCOMPANIED BY SUMMONS SERVED. *Latter becomes leading process.*

Where in an attachment suit an ordinary summons is issued simultaneously with the writ and is served upon the defendant it becomes the leading process and the attachment becomes ancillary.

2. SAME. *Sufficiency of warrant tested by its averments alone.*

In such case the question as to whether the warrant states a cause of action must be determined upon its face, unaided by the statements in the attachment or the affidavit therefor.

3. JUSTICES WARRANT. *Failure to disclose nature of action void.*

A Justice's warrant which does not contain language indicating the nature and cause of the action and conveys no notice of its nature to the defendant is absolutely void and judgment thereon should be arrested.

4. DAMAGES EXCESSIVE. *Erroneous instructions with reference thereto harmless error. Also with respect evidence cured.*

An assignment of error that the Court erroneously instructed the jury with reference to the measure of damages and that error was committed with respect to the introduction of evidence as to the extent of damages will not be sustained when it is manifest that the jury did not return a verdict for an amount exceeding that to which plaintiff was entitled under any aspect of the case.

5. CONTINUANCE, APPLICATION THEREFOR. *Review of action.*

The rule obtaining when the bill of exceptions fails to disclose all that was submitted to the Court upon a motion for new trial will be applied to the action of the Court in denying a

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continuance where it is shown that oral testimony not included in the bill of exceptions was heard. It is essential in such case that the bill of exceptions show that it contains all the evidence heard.

FROM HAMILTON COUNTY.

LITTLETON, LITTLETON & LITTLETON for Plaintiff in Error.

T. POPE SHEPHERD for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

AN automobile belonging to Ed Herron, going along a road or drive leading up Walden's Ride in Hamilton County, collided with an automobile going down the ridge along the same drive, and was damaged. Herron sued Rosenbaum to recover for the damage done to his machine, bringing his suit by attachment before a Justice of the Peace. Rosenbaum was a non-resident of the State of Tennessee, and the attachment was sued out on that ground. A summons was issued contemporaneously with the attachment, and it appears from the return of an officer that the summons was served, but there is nothing to indicate that the attachment was served unless such can be inferred from the fact that the Justice of the Peace in rendering judgment rendered it in favor of plaintiff Herron and against defendant Rosenbaum for \$245.00 and costs, and recited therein that "judgment is entered against C. E. James, surety on the replevin bond, for \$500.00 to be satisfied by return of property attached or settlement of judgment against the defendant." Clearly

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this language of the judgment taken alone would indicate that the automobile had been attached and a replevin bond given by Rosenbaum in lieu of it, but, as already stated, the officer's return fails to show that the attachment was levied, and no replevin bond appears in the record. Rosenbaum appealed to the Circuit Court, and the case was there tried before the Circuit Judge and a jury, and a verdict rendered for \$393.25 in favor of Herron and against Rosenbaum, but on motion for a new trial the Court, being of opinion, as the record recites, that the verdict was excessive by \$100.00, rendered final judgment for only \$293.25. The defendant below then moved the Court to arrest the judgment on the ground that neither the summons, the original attachment, nor the affidavit for the attachment stated any cause of action. This motion was overruled, and defendant appealed to this Court, and has here assigned errors.

We will first consider an assignment to the effect that the trial Court committed error in failing to arrest the judgment.

The affidavit for the attachment sets out that Herron, the plaintiff below, made oath to the effect that Rosenbaum was indebted to him "in the sum of \$500.00 for damages negligently caused to automobile; that said claim is just, due and unpaid, and that said debtor of defendant resides out of the State of Tennessee;" while the writ of attachment issued thereon simply commanded that the estate of Joseph Rosenbaum, or so much thereof as shall be of value sufficient to satisfy the debt or judgment of plaintiff, be attached; while the summons is in the following language:

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"STATE OF TENNESSEE:

HAMILTON COUNTY.

"TO ANY LAWFUL OFFICER OF SAID COUNTY:

"Summon Joseph Rosenbaum to appear before H. F. Lawrence, J. P., at his office at Chattanooga, Tenn., to answer the complaint of E. D. Herron in a civil suit for \$500.00 commenced by original attachment returnable before said J. P. This 17th day of September, 1913.

"W. F. LAWRENCE, J. P."

It is seen that the only place where there is any effort to set out or state the cause of action, or which purports to give notice to defendant of the nature of the "complaint" he was called upon to answer, is found in the affidavit, and the only statement therein found which gives such notice is that Rosenbaum is indebted to Herron "in the sum of \$500.00 for damages negligently caused to automobile." The summons which issued only commanded that Rosenbaum be summoned to answer the complaint of Herron in a civil suit for \$500.00 commenced by original attachment, but gives absolutely no notice of what the suit was about, or how the claim had originated; and the question is, is this a sufficient statement of the cause of action? The settlement of this question, of course, depends on the provisions of our statutes.

Shannon's Code, section 5222, provides that "In all suits commenced by original attachment in any Court of record, or before a Justice of the Peace, it shall be the duty of the Clerk or Justice issuing the attachment, upon application of the plaintiff, to issue a summons also against the defendant for the same cause of action." And section 5223 provides that "The summons shall be in the usual form, and, in addition, shall notify the defendant

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that an original attachment suit has been commenced against him, and shall be returned to the same Court or Justice as the attachment."

Clearly the requirement that "The summons shall be in the usual form," has reference to the summonses provided for in the preceding section, which, by its express terms includes the summons issued either by 'the Clerk or Justice issuing the attachment,' and necessarily means that when the suit is brought in a Court of record the summons issued thereon shall be in the usual form of summonses issued from such Court notifying defendants of the bringing of suits against them, which form is prescribed by Shannon's Code, section 4520; while when the suit is brought before a Justice of the Peace the summons shall be in the usual form for such summonses, which in that case is prescribed by a different statute found in Shannon's Code, section 5958. The question then is, this case being brought before a Justice of the Peace, does the summons conform to the provisions of the Code applicable thereto? And it is clear it does not, as it does not state any cause of action whatever. Under the holding in *Railroad v. Flood*, 14 Cates, 56; and *Railroad v. Davis*, 19 Cates, 167, this summons is wholly insufficient, and the judgment rendered thereon should have been quashed, unless the fact that the case is an attachment case, and unless the law applicable to attachment cases requires the application of a different rule. We are of opinion that it does not so require. We are further of the opinion that it is exceedingly doubtful if, under the holding in the case of *Railroad v. Davis*, *supra*, the affidavit in the case at bar states a cause of action, even if the cause of action could be set forth therein. In the *Davis* case the cause of action was stated as "damages for personal injuries," while the affidavit in the instant case states the cause of action as

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being "damages negligently caused to automobile," and it is doubtful if the statement "damages negligently caused to automobile" is any fuller than the statement "damages for personal injuries;" but we do not regard that question before us for decision, and therefore do not pass on it.

The facts, already mentioned, that the summons in the instant case issued contemporaneously with the attachment end was served, we regard as controlling; and that they are controlling becomes apparent when the cases of *Bivins v. Mathews*, 7 Bax., 257, and *Grubbs v. Colter*, 7 Bax., 432, are read and considered, each in the light of the other. In the *Bivins-Mathews* case the very statute carried forward into Shannon's Code and embodied in sections 5222 and 5223, parts of which have been copied herein, was construed; and it was held that "if the summons is served on the defendant, then this becomes the leading process in the case, the attachment, if levied on property, taking the position equivalent to an ancillary attachment, and holding the property until the termination of the litigation." In the *Grubbs-Colter* case a summons was issued and served *after* the attachment was issued and levied, and it was there held that this did not change the status of the case, that the attachment having been issued and levied was the leading process, thus emphasizing the holding in the *Bivins-Mathews* case, that where attachment and summons issue together and the summons thus issued is served the status of the case is thus fixed and the attachment, although served, is merely ancillary. That the holding in the *Bivins-Mathews* case is sound is evidenced by the fact that it met approval in the later case of *Templeton v. Mason*, 23 Pickle, 625. Still another case in point here is that of *Walker v. Cottrell*, 6 Bax., 257. There, construing our statutes with reference to attachments, it was held that "There can be no two leading writs

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in the same suit against the same defendant at the same time."

It necessarily follows, then, whether the attachment in this case was levied or not, that the summons became and is the leading process, and the attachment when originally issued became, and now is, no more than an ancillary attachment; and from this the further inevitable conclusion is that the summons, to be valid, should be sufficient as a summons, and not being so, any judgment rendered on it is void, and the motion in arrest should have been sustained.

It need scarcely be said, but, to avoid any misconception, it is proper to remark, that it is not meant to hold or state that, in a case where the attachment is the leading process, the summons would have to be legally sufficient to make any judgment under the attachment valid; our holding applying only where the summons is the leading process.

There are other assignments of error in the case which we will briefly refer to, as this is not a Court of last resort, but which, if its decisions were final it would perhaps not deem necessary to deal with; and we might here remark that the opinions of this Court are often made longer than they would be if this were a Court of last resort. This results from the fact that litigants and attorneys are usually entitled to have all questions made by them reviewed here, as they might, or the losing party might, want to apply for a writ of certiorari, and on such application he would naturally want all questions before our Supreme Court, and would perhaps have a right to have them there, as that tribunal might not agree with this Court that some one question is wholly controlling.

One of the other questions made is that there is no evidence to support the verdict of the jury, in reply to which

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it is necessary to say only that there was evidence to the effect that the machine belonging to defendant in error while going up a mountain road or drive skidded and deflected, throwing it from that side of the road to its right, and that at that time Rosenbaum's machine was coming down the road, running in its center, at a rate of about twenty miles an hour; that at the place of collision there was room for the Rosenbaum machine on the side to its right; and that at that point the Rosenbaum machine was turning a curve, and was being operated by a chauffeur who was unfamiliar with the road; and, in addition to all this, there was evidence indicating that the Rosenbaum machine failed to put down the brakes or make other effort to stop, or to avert the collision when there was nothing to prevent its stopping or taking some other course to accomplish the purpose indicated. There was evidence, it is true, indicating that the Rosenbaum machine was not running at an excessive rate of speed, and indicating that it was not running in the center of the road, and that it made efforts to avoid the collision; but it was for the jury to say what the true facts were. It needs but be stated that for a machine in the hands of one unfamiliar with a road to turn a curve at the rate of twenty miles an hour while running down hill in the center of the road is negligence; and for it to fail to take steps, by putting down brakes or otherwise, to avoid a collision, when within its power to do so, is too palpable a neglect of duty to require more than a statement of the facts. It is true the other machine was also about the center of the road, but, as the evidence indicated, it had unavoidably skidded to that point.

It is also assigned as error that the Court permitted plaintiff in error and other witnesses to testify, over objection, as to the reasonable rental value of Herron's machine while it was laid up for repairs, and that the Court

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erred in charging the jury that if Herron was entitled to recover he was entitled to such an amount as would compensate him for the injuries done to his machine "taking into consideration what he had to spend in repair of the car, and also what would have been the reasonable rental value of that car;" the contention being that evidence of rental value was incompetent, and that the jury could not consider any such evidence, and should not have been told to consider it in arriving at a verdict in the case. As to the complaint at the action of the Court in admitting the evidence referred to, it need but be said that there was no objection to that evidence at the time it was offered; and as to the charge of the Court, we think any error that was committed was cured by the Court's limiting its judgment to the amount shown to have been expended by Mr. Herron in repairing the car, which was done by the remittitur. This, of course, eliminated all question of rental value, there being no controversy whatever as to the expense of repairing, and thereby cured the errors complained of, if errors. *Railroad v. Martin*, 5 Cates, 266.

It is also complained that the Court committed error in refusing to grant a continuance because of the absence of certain witnesses, and that he committed error in not granting a new trial because of newly discovered evidence. There was no error in these matters, for the reason that the record fails to show that reasonable diligence was used to have the witnesses present because of whose absence the continuance was sought, and in not obtaining information before the trial as to the evidence that was discovered thereafter. In truth, the record shows that the case was tried before a Justice of the Peace by one of a firm of attorneys, and in the Circuit Court by another attorney of the same firm, and it rather clearly appears that the attorney trying the case before the Justice of the Peace had actual knowledge

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before the trial in the Circuit Court of the so-called newly discovered evidence, and it is also clearly inferable that Mr. Rosenbaum himself had knowledge of it.

It further appears that, on the application for a continuance, the Court heard oral statements made by counsel as to the materiality of the witnesses because of whose absence the continuance was sought, and as to the circumstances surrounding their absence, and that on the motion for a new trial because of the newly discovered evidence certain affidavits were offered; yet the record fails to show that on the application made for a new trial the matters set out in the bill of exceptions were all that the Court heard on the motion, and it fails to show that the affidavits sent up and which were offered on the application for a continuance contained all that the Court heard on the application. Without such showing this Court could not in any event reverse the action of the trial Court in failing to grant either the continuance or the new trial, for the reason that when the trial Court hears anything in the way of evidence on such motions it is as necessary to show that the bill of exceptions contains all that was then heard as it is to make such showing with reference to evidence heard in the trial of the case on its merits. *Eatherly v. State*, 10 Cates, 371; *Odeneal v. State*, 128 Tenn., 60.

The result is that we find no error in the action of the trial Court, except in its ruling on the motion to arrest the judgment, but because of that error the judgment of that Court is reversed, and the case dismissed; and defendant in error is taxed with the costs.

Thomasson v. Telegraph Co.

BONNER THOMASSON V. WESTERN UNION TELEGRAPH
COMPANY.

Affirmed by Supreme Court, at Jackson, 1915.

1. VERDICT. *Assignment of no material evidence to support. Contradictory testimony.*

It cannot be successfully urged under an assignment that there is no material evidence to support the verdict that the testimony of plaintiff's witnesses is contradictory and therefore not worthy of belief.

2. PLEADING AND PRACTICE. *Declaration in assault and battery. Excessive force.*

A party who uses an ordinary or simple declaration in assault and battery may recover under such pleading for excessive force used in the exercise of a right or privilege. In such case that force which is excessive may be termed a battery.

FROM SHELBY COUNTY.

Appeal in error from Circuit Court of Shelby County.
A. B. PITTMAN, Judge.

ANDERSON & CRABTREE for Plaintiff in Error.

GREER & GREER for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS case was brought in the Circuit Court of Shelby County by Bonner Thomasson, a minor suing by next friend, against Western Union Telegraph Company and C. H. Carroll, to recover damages because of an alleged

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assault and battery committed on him by Carroll, who at the time of the alleged assault, was in the service of the telegraph company acting as a district manager. Each defendant filed a plea of not guilty; and, on the issues made by the declaration and the pleas, a trial had before the Circuit Judge and a jury resulted in a verdict and judgment against both defendants in favor of plaintiff below, in the sum of \$300.00, \$250.00 actual damages and \$50.00 punitive damages. But, on motion of defendants below, the judgment was set aside and a new trial granted them. A wayside bill of exceptions was made up at that term of the Court, and at the next term thereafter the case went to trial a second time on the same evidence offered on the first trial, the evidence as preserved in the wayside bill of exceptions being, by consent, used on the second trial; and this second trial resulted in a verdict in favor of defendants below and a judgment dismissing the suit; and from that judgment plaintiff below appealed to this Court. His first complaint here is of the action of the trial Court in setting aside the judgment for \$300.00 and granting a new trial.

It was argued orally before this Court, and is said in the briefs filed on behalf of Thomasson, that the trial Court set aside the first verdict and judgment based thereon and granted the new trial because of the preponderance of testimony, but that he committed error in finding that the evidence preponderated in favor of defendants below, that instead of its so preponderating all the credible evidence was in favor of plaintiff below; and, further said and argued that in fact there was no credible evidence in support of the theory of defendants below, and that therefore this Court should reverse the action of the trial Court in setting aside the first judgment and enter judgment here on the first verdict of the jury. These contentions, it is

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seen, when they are analyzed, really do no more than invite this Court to weigh the evidence and find where the preponderance lies. Further, not only the contentions invite a weighing of the testimony, but when the record is referred to it is found that there was much testimony in support of the theory of defendants below to the effect that no assault was committed, so that before this Court could disturb the action of the trial Court in setting aside the first verdict it would in fact have to weigh the evidence. But it is said that the witnesses offered on behalf of defendants so contradicted themselves that they destroyed the testimony of each other, thus leaving no testimony in favor of defendants below.

The theory that this Court should weigh the testimony is without legal foundation; the matter of weighing the testimony after the jury has returned a verdict is for the trial Court, and when he has acted if there is any material evidence to support his action this Court cannot disturb it by any process of weighing the testimony. *Spoke & Handle Co. v. Thomas*, 114 Tenn., 458.

That the testimony of defendants below was so contradictory as that it all becomes immaterial or no testimony is without foundation in law or in fact. Carroll testified there was no assault, and in that he was directly corroborated by the testimony of others who were present and saw the occurrences out of which the suit grew. One of the witnesses actually used the expression that he "saw the controversy or heard it just as related by C. H. Carroll," and four others all joined in a common statement, or their evidence is put into a common statement in the bill of exceptions, and they all say that they never saw Carroll strike any blow, one of the acts Thomasson claims constituted the offense, and other witnesses who testified corroborated Carroll, except as to certain matters which Carroll says did

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occur which they say they did not see. Clearly this is abundant corroboration, if such were necessary. But if there were direct contradictions on every material matter, such would not have the effect of destroying the testimony, and leaving the case as if no such testimony had been introduced. Clearly contradictions cannot have any such effect. If A. swears that a certain thing is true and B. swears directly to the contrary who can say that neither has told the truth though they were both offered by the same litigant? It is for the triers of fact to weigh their testimony and say what the truth is. In like manner B., C. and D. cannot simply destroy the testimony of A. What A. has sworn might be true though ever so many have testified to the contrary. The truth to be gotten from such conflicts is necessarily to be left to the triers of fact, and an Appellate Court cannot say that the testimony of any witness has simply been destroyed and ceased to exist as if never given, by the swearing of others to the contrary. The first assignment of error is therefore overruled.

By the second assignment the charge of the Court to the jury is complained of, and in order to intelligently consider that assignment it becomes necessary to state the contentions of the parties as disclosed by the pleadings and the evidence adduced on the trials below. Thomasson alleges in his declaration that, on December 31, 1912, he went to the office of the Western Union Telegraph Company for the purpose of collecting an amount due him, and that "while in the defendant's office on said business and while discussing same with the defendant Carroll, who is an official of the defendant company, and who was at the time discharging the duties of settling with plaintiffs and others for the defendant company, the said C. H. Carroll acting within the scope of his employment and as an official of said company and as an individual, violently with-

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out cause or provocation assaulted plaintiff who is a minor, fourteen years of age, drew a revolver on him and threatened to blow out his brains, seized him in the collar, dragged him to the door and put him out of the office, and cursed and abused plaintiff in the presence of numerous and divers persons."

It was disclosed by the evidence that Thomasson had been in the employ of the Western Union Telegraph Company as a messenger boy, and with other boys had been on a strike, but the strike had terminated, and the company had notified the boys to appear at its office in the city of Memphis in the afternoon of December 31, 1912, and receive the amounts due them for services they had rendered. When they gathered for this purpose they were required to line up on the outside at the entrance to the company's office, and enter, one at a time, to be paid. Thomasson, when it came his turn to enter, went in and was presented a voucher for twelve dollars and some cents, and was asked to sign it as a receipt showing that the amount was in full of the sum due him. He refused to sign that receipt or voucher, claiming that the company owed him twenty-two dollars and some cents, said he would not sign it till he was paid the full amount due him. On Thomasson's doing this, and without any further provocation on his part, except that he says he refused to sign the receipt and wait till the other boys were paid off that he might be settled with, and without his being so much as ordered out of the room, according to his statement, Carroll, acting for the telegraph company, slapped him in the face, seized him by the collar, and, with the statement that he would blow his brains out, drew a pistol on him, and with the drawn revolver took him to the door and ejected him. He offered other evidence in corroboration of his statements as to the manner of his ejection. He testified that his cheek was

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bruised by the lick Carroll dealt him. Carroll, on the other hand, says that when Thomasson made the question that something more than \$22.00 was due him, he, Carroll requested him to sign the voucher, go away and return the next day when they would make settlement and correct any mistake that had been made, and that Thomasson refused to do this, coupling his refusal with rough language; that he then requested that such language be not used in the presence of ladies, there being at the time some ladies in the room, and that it was then he took him by the collar of the coat with one hand and lead him to the door; that as they arrived at the door the crowd of messenger boys on the outside were making demonstrations, and that he, Carroll, then drew his pistol for the purpose of keeping the boys on the outside from breaking into the office, saying in effect that he used no more force than was necessary to cause Thomasson to leave the office; and, as already stated, Carroll was corroborated in his statements by a number of other witnesses, though, according to some of the witnesses who testified for defendants below, Carroll did not so much as draw a pistol.

It is seen that if the plaintiff below is wholly correct, he was assaulted and roughly handled without any justification, but if Carroll is correct as to ordering the boy out of the room and the boy's refusing to go and he, Carroll, then used no more force than necessary to put him out there was no wrong done, while if Carroll is correct only as to the facts justifying his ejecting the boy, but the boy is correct as to the excessive force used, then to the extent that the force was in excess of that necessary and proper Carroll would not be in the right. It is here proper to say that Carroll does not so much as claim that the boy resisted the efforts to eject him.

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With the case made out by the pleadings and the evidence just set out the Court charged the jury, among other things, as follows: "The Court instructs you, gentlemen of the jury, that the issue of fact which determines whether the defendant is liable or not, is this: Did Carroll strike the boy merely upon the boy's refusal to accept the money and sign the voucher; or did Carroll ask him to leave, and did he refuse to leave? If you answer that Carroll struck him and put him out, and abused him merely because he refused to accept the sum tendered, the defendant is liable. But, if Carroll told him to go away and come back and the boy refused to do it, then Carroll had a legal right to take hold of him and put him out, and it is immaterial whether he drew a pistol on him or not.

"This suit is brought upon the theory that Carroll abused, assaulted, and beat him without any provocation at all. This is not a suit brought to recover damages for an excessive use of force in expelling the boy. If Carroll told the boy to leave, it was the duty of the boy to leave, and if he refused, then Carroll had the legal right to expel the boy; and if Carroll used more force than was necessary in expelling him, the company would be liable if there was a suit brought here upon the theory that Carroll had the right to expel him, but used more force than was necessary."

The contention of the plaintiff in error is that this portion of the charge was erroneous in that it made the case depend on the sole question of whether or not Carroll had a right to eject the boy from the room, and did not permit a recovery in the event Carroll in ejecting the boy, if he had the right to eject him, drew a pistol on him, although it was not necessary to draw it, and used unnecessary violence in ejecting him; and we are of opinion this contention is meritorious. We think the error found in the por-

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tion of the charge set out arises out of a misconception of what is meant by an assault or an assault and battery. In our view an act or a series of acts does not in law become an assault and battery until it has reached the point of being excessive, and that therefore if Carroll used no more force towards the boy than was proper and necessary in ejecting him there was no assault whatever; and that the declaration, in charging the offense committed by Carroll on the boy, properly construed, comprehends not only that force used toward and on the boy that had no character of justification whatever, but also any and all unnecessary force, although some force might have been necessary and proper, and that therefore the issue tendered by the declaration and made up by the pleas of not guilty includes either character of assault; that is an assault or an assault and battery where there were no circumstances justifying any character of force or demonstration, and where the force and demonstration, although to an extent justified, exceeded the point of justification, and thereby became an assault or an assault and battery.

It is seen that the portion of the declaration hereinbefore set out charge that Carroll "violently *without cause or provocation assaulted* the plaintiff, . . . drew a revolver on him and threatened him," seized him, dragged him, cursed and abused him, etc. These charges, we think, are broad enough to include the case where there was no provocation to use any kind of force or where the force had become excessive to an extent not justified, because in either event it would be an assault without provocation, in so far as excessive force was concerned; and in this view of the law we think we are borne out by the authorities.

In Rawl's third revised edition of Bouvier's Law Dictionary, being the 8th edition of that work, issued in 1914,

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volume 1, pages 253-4, under the word "assault," is found the following: "An unlawful offer or attempt with force or violence to do a corporeal hurt to another.

"Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril. Bish Cr. Law, 548. . . .

"Any act causing a well-founded apprehension of immediate peril from a force already partially or fully put in motion is an assault: 4 C. & P., 349; 9 *Id.*, 483, 626; *Com. v. White*, 110 Mass, 407; *State v. Davis*, 23 N. C., 125, 35 Am. Dec., 735; *State v. Crow*, 23 N. C., 375; *Com. v. Eyre*, 1 S. & R. (Pa.), 347; *State v. Sims*, 3 Strobb. (S. C.), 137; *State v. Blackwell*, 9 Ala., 79; *United States v. Hand*, 2 Wash. C. C., 435, Fed. Cas. No. 15, 297; unless justifiable. But if justifiable, then it is not necessarily either a battery or an assault. Whether the act, therefore, in any particular case is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was justifiable cause."

Clearly, according to this definition, an assault consists in the *unlawful* attempt, in force *unlawfully* directed, etc., and a gentle imposition of hands when justifiable is not an assault.

Further bearing out this view of what it takes to constitute an assault, and especially applicable to the case in hand, is found the following in the volume just quoted from and still defining the word "Assault": "It is not an assault for a beadle to turn out of church a man who is disturbing the service, if without unnecessary violence; (1893) 1 Q. B., 142; or for the master of a house to expel one who comes into his house and disturbs the peace of the family: 3 C. & K., 25. . . ."

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"A teacher has a right to punish a pupil for misbehavior; but this punishment must be reasonable and proportioned to the gravity of the pupil's misconduct; and must be inflicted in the honest performance of the teacher's duty, not with the mere intent of gratifying his ill-will or malice. If it is unreasonable and excessive, is inflicted with an improper weapon, or is disproportioned to the offense for which it is inflicted, it is an assault: *Vanvactor v. State*, 113 Ind., 276, 15 N. E., 341, 3 Am. St. Rep., 645; *State v. Stafford*, 113 N. C., 635, 18 S. E., 256; *Spear v. State* (Tex.), 25 S. W., 125."

See also 3 Cyc., 1066, where the term assault, as used in a civil action, is defined as follows: "An assault is an unlawful offer of corporeal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well-founded fear of immediate peril."

See also *Smith v. State*, 8 Lea, 404, where in speaking of one who was charged with an assault and who defended on the proposition that he used no more force than was necessary, it is said, "If he is entitled to defend himself from an assault, and used no more force than is necessary for the purpose he cannot be guilty of an assault and battery on his adversary," which is the equivalent of saying that assault and battery is only committed when the force used is excessive.

Defendants rely, in justification of the charge of the Court, on the case of *Tomlinson v. Darnell*, 2 Head., 539; but we are of opinion when that case is carefully examined it is found it does not support the proposition for which it is cited. That case was brought to recover damages for injuries inflicted on a slave, the slave being treated as a piece of personal property. Defendant by his plea, unlike the defendant in the case at bar, *admitted the acts*

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complained of, but said that they were justified by virtue of his official position as a patrolman, and the case on the issues thus made up went to the jury. It was held that if the plaintiff, after the defendant confessed the acts complained of but sought to justify on the grounds of his official position, meant to rely on the fact that the patrolman in the acts attributed to him exceeded his official authority, he should have so pleaded by replication, and not having so pleaded such was not in issue, as defendant had admitted all that was alleged against him. That such is the case is shown by the following statements taken from the opinion in it: "The defense relied upon was, that the acts complained of were done in the exercise of the duty of a patrol, by Tomlinson, with the assistance of the others. . . . The plea justifies the act complained of, upon the ground that Tomlinson was a patrol. The general replication only puts that fact in issue. If the plaintiff intends to rely upon the fact that the chastisement was so excessive that it was not justified by the authority of the office, that must be put in issue by a special replication. . . . The pleadings present nothing to be tried but the fact of defendant's official character; and if that be established, the verdict must be for him, and there is no other matter in issue. If the plaintiff chooses to rely upon excessive punishment, or improper exercise of authority by the defendant, he must make an issue upon that point, by a special replication to that effect."

Now the distinction between the case at bar and the Tomlinson-Darnell case, is that in the case at bar there was absolutely no admission of the acts charged to defendants, but an absolute denial of everything charged. Of course, if there had been an admission that the acts charged against defendants were in fact committed, and then something else had been pleaded as justification, that would have

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called for a replication, and such is the Tomlinson-Darnell case.

For the error indicated the judgment of the lower Court is reversed and the case remanded. Defendants are taxed with the costs.

JACK WALKER V. J. H. VERBLE ET AL.

1. **ISSUE DEVISAVIT VEL NON.** *Many contests. Practice. Consolidation.*

Where it appears that there are pending in one Circuit Court two or more contests involving questions as to what was the last will and testament of a party and what were and were not valid codicils, it is both allowable and commendable for the trial Judge to direct consolidation of all the contests and to formulate proper issues upon which it can be determined as to what was the last will and testament of the testator.

2. **SAME.** *Certiorari for removal to Circuit Court of controversies pending in the County Court.*

Where in such case it is suggested to the Circuit Judge that there are pending in the County Court other proceedings and contests which have reference to the issue of devisavit vel non, it is proper, at least not erroneous, for the Court to supersede the controversies in the County Court and direct their removal by certiorari to the Circuit Court to be determined along with the main controversy.

3. **SAME.** *Practice. Simplification.*

Where a Court has correctly assumed jurisdiction for the purpose of determining which of various documents do constitute the last will and testament of a testator, it is competent and proper to require that all parties contesting the validity of any one of the papers and all parties asserting the validity of any one of them submit themselves to the main litigation, and to this end the Court may issue such orders and formulate such issues as will settle the several points arising.

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4. SAME. *Attorneys' fees and costs. Unsuccessful efforts to establish will.*

The general rule is that a nominated executor in any will or codicil of a testator who in good faith contends that the document is the last will and testament, or part of the last will and testament, of the testator is entitled to costs and reasonable attorneys' fees incurred in his unsuccessful effort to establish the document.

5. EXECUTION OF WILL. *Signature of testator by beneficiary.*

A will to which the signature of the testator has been appended by a beneficiary therein is not for that reason invalid, provided it be clearly shown that the beneficiary acted at the suggestion of the testator. But this circumstance casts a suspicion upon the document, and places the burden upon the beneficiary to prove clearly that the testator understood the instrument and signed it voluntarily and knowingly.

6. EXECUTION OF WILL AT TESTATION.

It is incumbent upon the proponent of a will to prove its due execution. But this may be done by circumstances and by other evidence than that of the attesting witnesses when the latter cannot be produced.

7. SAME. *Handwriting of deceased witnesses.*

It is always competent to prove by a surviving attesting witness that he saw his co-witness attest the instrument; and it is also competent to prove the handwriting of any attesting witness who is dead at the time the will is offered for probate.

FROM PUTNAM COUNTY.

Appeal in error from Circuit Court of Putnam County.
C. E. SNODGRASS, Judge.

B. G. ADCOCK, W. R. OFFICER, and H. S. BARNES for
Walker.

ALGOOD & FINLEY, O. K. HOLLADAY, WORTH BRYANT
and BOYD & BOYD for Defendants.

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PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS litigation presents a contest by three parties, to wit, Jack Walker, J. H. Verble and Alex, or D. A., Verble, as to which one has the right to administer upon the estate of Elizabeth Bartlett, deceased, and as to the disposition of her estate under different wills and codicils alleged to have been executed by her.

The litigation, in the shape it finally assumed in the Circuit Court of Putnam County, and in the form in which it appears before this Court in a large four-volume record, simply presents a contest as to the final disposition of the estate of Elizabeth Bartlett by her last will, embracing in the phrase "her last will" valid codicils executed by her.

To intelligently present and determine the questions raised by the various assignments of error, it is necessary to state, first, the essential facts disclosed by what may be designated the technical record and the undisputed facts, and then state the grounds of error based upon what occurred pending the trial in the Circuit Court.

Elizabeth Bartlett was an old lady when she died in Putnam County, in March, 1911. At the time of her death she had no living descendants. Her only child died a number of years before she did, and so had her husband.

January 20, 1902, she made a will and August 25, 1904, she added a codicil to it. We need not set out in this opinion her said will and codicil. It is sufficient to say that in the second, third, fourth, fifth, sixth, seventh, and eighth items thereof, devises, some of land, and bequests of money and personalty were made to named parties, and in the ninth clause of her said will she gave all

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the remainder of her property, both real and personal, to her brother-in-law, Jack Walker, and his wife, Clementine Walker. Clementine then being her only living sister.

In this clause of her will she nominated Jack Walker as the executor of her will and excused him from giving bond, "having," as her will states, "implicit confidence in his honesty and integrity."

In her codicil of August 25, 1904, she reduced the bequest to Jack Verble in the eighth clause of her will from \$400.00 to \$200.00, and the occupancy of the part of her home place given to Bill McCormack and his wife in the ninth clause of her will was reduced to one year.

In the codicil she gave to the Presbyterian Church at Cookeville \$200.00 and to the Presbyterian congregation at the Dry Valley Church, Putnam County, Tennessee, \$100.00.

Jack Walker presented this will and codicil to the County Court of Putnam County March 18, 1911, for probate, the day the testatrix was buried, but after her burial, and they were probated in common form as her last will and testament and letters testamentary ordered to be issued to him.

July 20, 1909, Elizabeth Bartlett, it is claimed, executed the following document, as a codicil to her former will:

"I, Elizabeth Bartlett, have this day decided to make some change in my will that I have heretofore made. I had heretofore willed to Jack and Clem Walker my home place, with the exception that I willed to Alfred Bartlett the east end of this farm (describing the part of it willed to said Bartlett). Now account to the age of Jack (meaning, of course, on account of his age) and to have

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the graveyard looked after longer, I will and bequeath to John H. Verble the lands of my home place with the exception of this farm heretofore mentioned, the condition that John H. Verble pay the sum of three thousand dollars (\$3,000.00) to Jack and Clem Walker, in payment of five hundred dollars each year for six years after my death with interest on all after the one year and after the said John H. Verble takes possession of said farm."

"It is further my will for Jack and Clem Walker or their heirs, to have a lien on said land until the said sum of three thousand dollars and interest are paid in full."

"I, Elizabeth Bartlett, believe the said land described in this will 'are' worth \$3,500.00. I also give the \$500.00 in this place to John H. Verble for the purpose of looking after the graveyard and to keep the iron fence painted once a year during his life time."

"It is my will that John H. Verble, immediately after my death, take possession of said farm and have this will put of record. Now, this is not to interfere with the other will that I have made, only on the land I had heretofore willed to Jack and Clem Walker. Now, as to the seven hundred and twenty-five dollar note that I hold on you at my death, you are to have \$400.00 out of this note for what you have done for me and pay your four children \$50.00 each and pay for my coffin and if any left, pay the balance to Alfred Bartlett.

"This is my last will and I authorize John H. Verble to sign my name to the same. This July 20, 1909.

Her

ELIZABETH X BARTLETT.

"Witness:

Mark

"GUSTAV VERBLE,

"MAT CONLAY,

"JOHN HOWARD."

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It is claimed that the testatrix, November 25, 1909, made another addition, codicil, or change in her will. It is in the following words and figures:

"I will and bequeath out of the above will, six hundred dollars (\$600.00); four hundred to brothers George, Alex, (\$400.00), one hundred to Mat Conlay (\$100.00), one hundred to Sitha Vinson (\$100.00). This is to be taken out of the body of the above will in *pro rata* on Jack and Clem Walker, Alfred and J. H. Verble.

This is my last will. I have hereunto made by mark to the same.

Her

"ELIZABETH X BARTLETT.

Mark

"Witness:

By J. H. VERBLE.

"J. W. HOWARD,

"GUSTA VERBLE."

Now, it is disclosed by the record, that Jack Walker, at and before he had the will of date January 20, 1902, and the codicil thereto, of date August 25, 1904, probated March 18, 1911, on the day that Elizabeth Bartlett was buried, knew of the existence of the two subsequent codicils above quoted and the claim of their validity by parties in interest. When he had his probate, he did not call the attention of the County Court to the existence of these subsequent codicils.

It is due to him, however, to state that his insistence is that he did not believe they were valid, or that they had been legally executed by the testatrix.

April 12, 1911, J. H. Verble filed a petition in the County Court of Putnam County against Jack Walker, praying that the order of the Court, admitting the former will of Elizabeth Edwards to probate, be set aside and

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for nothing held, and that the letters testatmentary issued to Walker be revoked, and that the codicils to her will as set out in this petition, they being the two above and herein copied, be admitted to probate and that letters testamentary issue to him, and for general relief.

This peition, while marked "Filed April 12, 1911," appears in the record to have been sworn to by J. H. Verble May 8, 1911.

This petition stated the probate of the original will and the codicil thereto procured by Walker, the issuance of letters testamentary to him, the substance of the disposition of her estate made therein by Elizabeth Bartlett, and alleged that the letters testatmentary issued to Walker were improperly issued, as said will and codicil were not her last will and testament, and set out the two subsequent codicils executed by her, hereinabove quoted.

He also alleged in the petition, that November 10, 1910, Elizabeth Bartlett executed another codicil to her will, making some changes in her will, and therein appointed petitioner, J. H. Verble, as her executor, this codicil being attested by him.

Walker, in obedience to the summons served upon him, appeared in the County Court of Putnam County, May 8, 1911, and answered the petition of J. H. Verble, his answer being sworn to.

In his answer, he avers that the will probated by him is the true, last, and only will of Elizabeth Bartlett. He denied that she had executed any codicil to her will except the one he had probated, and denied that letters testamentary had been improperly issued to him.

He denied that she had ever change or revoked her will as probated by him in any manner or form, and he especially denied that the paper filed as "Exhibit A" to

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the petition, (being the codicils presented by petitioner), is, or was ever intended to be, executed as a codicil, or was ever so executed by the deceased, or that the same is a codicil or the will, or any part of the last will and testament of Elizabeth Bartlett.

He puts in a general denial of all the allegations of the allegations of the petition.

The case presented by the petition and the answer thereto was heard by the County Judge upon the pleadings and oral proof, and he held that the letters testamentary issued to Walker at the March term, 1911, of the Court were improvidently issued upon the erroneous assumption that the will then admitted to probate was the last will and testament of Elizabeth Edwards, and he admitted to probate the codicils presented by J. H. Verble dated respectively July 20, 1909, and November 26, 1909, as proper parts of the will of Elizabeth Edwards, and he revoked the probate granted at the March term, 1911, of his Court and rescinded the same, in so far as it is in conflict with his order or judgment admitting to probate the subsequent codicils above mentioned, leaving the original probate in all other respects in full force and effect.

Walker excepted to the above action of the Court and prayed an appeal to the next term of the Circuit Court of the county, which prayer was granted upon condition that he execute bond in the penalty of \$500.00 conditioned as the law requires. It will be noticed that Walker never objected before the County Court, in connection with the above matter, that it had no jurisdiction to grant the relief it did grant.

The foregoing does not exhibit all the codicils or amendments made by Elizabeth Bartlett to her original will or codicils she is alleged to have made to it.

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June 19, 1911, Alex, or D. A., Verble, filed a petition in the County Court of Putnam County against Jack Walker and John A. Verble.

In this petition, after stating the steps taken in the Court to probate the will and codicil to it presented by Walker, and the action of the Court in probating the codicils to the will of Elizabeth Bartlett presented by John H. Verble, it is averred that the letters testamentary issued to John H. Verble, under his proceeding had been improperly issued, on the ground that the will and codicils probated under said proceedings were not the last will and testament to said Elizabeth Bartlett.

It avers that she, on January 12, 1911, made her last will and testament therein, revoking all former wills made by her in which will she made a complete disposition of all her property, both real and personal, and in which she nominated petitioner, Alex Verble, her executor.

This will is made a exhibit to the petition.

The prayer of the petition is, that the orders of the Court admitting to probate the will and codicil presented by Walker and the codicils presented by John H. Verble be set aside and the letters testamentary issued thereunder be revoked and that the paper presented by petitioner be declared to be the true, whole, and last will of said Elizabeth Bartlett; that it be probated as such, and that letters testamentary issue to petitioner thereunder.

This will offered for probate by Alex, or D. A., Verble is a complete will in its terms and disposes of all the estate of Elizabeth Bartlett. It revokes all former wills made by her at any time. It embraces eleven clauses. The first directs the payment of her funeral expenses and debts. The second gives to John H. Verble her home and farm, describing it, also a note she held against him for \$750.00, and \$1,000.00 of the money she had on deposit in a Cooke-

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ville bank, burdened with the obligation on his part to keep the family cemetery in good repair, cleaned off yearly, fenced, and of placing tombstones at all the family graves without further charge.

The third gives to Alfred Bartlett, a young man she had raised, forty-five acres of land on the eastern portion of her farm, describing the land given him, and, also, a two-horse wagon, a pair of good mules, a bed and bed clothes and \$100.00 in money.

The fourth gives to Evaline, a colored woman, who stayed with her, cooked and waited on her during her illness, \$125.00, to be paid by her executor out of any money she died possessed of, or that came into his hands.

The fifth retracts \$100.00 bequeathed and set apart to George Buckner, her nephew, \$25.00 to Barlett McCormack, and \$25.00 to Joseph McCormack, and she gives to Bartlett McCormack one of her beds and bed clothes. In short, this item of the will gives the \$100.00 formerly given to said church, to the parties above stated in the proportion stated.

The sixth gives to Mat Conlay \$125.00 instead of land his services rendered her during her life.

The seventh gives to the C. P. Church, or the trustees of the same, Dry Valley, Tennessee, \$50.00 to be used to "the glory of God."

The eighth nominates and appoints Alex Verble as her executor, and directed that he be paid \$100.00 for acting as such. She excuses him from giving bond.

In this clause of the will, she gives said Verble \$400.00 in money to be paid out of her estate.

The ninth directs that her executor take charge of all her property or means not disposed of in this will, to advertise and sell the same and pay her debts and expenses

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out of the same, and keep the remainder, if any, for himself, and his own use.

The tenth directs that Lean McCormack be paid \$25.00 for his services rendered her during her life.

The eleventh directed and requested that some suitable minister of the gospel, at some future time convenient to him, come to her old homestead and preach her funeral, and that he be paid \$10.00 for doing so, and, in this clause, she directs (we quote) "that John Watsons, deceased, (best known as the little preacher boy) be paid \$5.00 to purchase 'bible and song book.'"

The will concludes as follows:

"Lastly, it is my last desire and request that there be no controversy or litigation over this, my last will and testament, by any person or kindred, as to how I have bequeathed my effects, as I am lawfully possessed of same, and to think and feel, while in my right presence of mind, I have a perfect right to bequeath same to whomsoever I may after due consideration, without compulsion or restraint for my own peace and comfort and good will to all."

This will was signed by the testatrix by her mark, and was attested in regular and legal form by Benjamin F. Sloan and Guy Bohannon.

Jack Walker demurred to the aforesaid petition of Alex, or D. A., Verble, on the following grounds:

1. Because the petition fails to make the legatees and devisees under all of said wills and codicils, or either of them parties to it.

2. Because the petition seeks to have the County Court revoke and set aside the order and judgment or probate as to the first will, (which order and judgment, etc., was

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made by the County Court at its ———— term, 1911), revoked, set aside and rescinded, at a subsequent term of the same Court.

3. Because the petition seeks to have what is alleged to be the last will and testament of the said Elizabeth Bartlett, deceased, probated as such last will and testament, before the order and judgment probating the will in which this defendant is executor is lawfully annulled, vacated, rescinded or revoked.

The County Judge overruled this demurrer and Walker excepted. He put in a lengthy answer to the petition. After stating the steps taken under and in reference to the previous probates of the will and codicils of Elizabeth Bartlett, the answer insists that the order of the Court probating the will presented by him was regular and legal, that said will was the last will of said Elizabeth Bartlett that its probate had never been legally set aside, as the County Court had no authority or jurisdiction to rescind, vacate, or revoke the probate of the will presented by him at any subsequent term of the Court.

His insistence, further is, that, conseding that the Court had authority and jurisdiction at a subsequent term to vacate and revoke a probate of a will made at a former term, it could not exercise it without all the devisees and legatees under the will presented by him and probated, being made parties.

He denies that January 12, 1911, Elizabeth Bartlett made her last will, the one presented by Alex, or D. A., Verble, revoking all former wills made by her, and avers that said alleged will presented by said Verble was not her will and was never lawfully executed.

He further avers that when said alleged will purports to have been executed, Elizabeth Bartlett was not possessed

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of a sound mind and disposing memory, and that said alleged will is a gross fraud brought into Court and attempted to be probated and that it was gotten up by John H. Verble, his relatives and friends, solely for the purpose of defeating and swindling him of his right under the will probated by him, and that said Verble and his friends well knew at the time of the alleged execution of said will, that the purported testatrix was old and feeble in body and mind and was incapacitated to make a valid and subsisting will, and that she had been in such condition for a considerable time before that date.

The answer of John H. Verble simply says that he neither admits nor denies the allegations of the petition of Alex Verble, but demands strict legal proof of all its allegations.

The County Court, July 17, 1911, sustained the petition of Alex Verble and declared that the will and codicil probated under the application of Walker and the codicils probated by John H. Verble were not the last will of Elizabeth Bartlett, and that the paper presented by Alex, or D. A., Verble was, and it ordered its probate, the other probates being set aside and that letters testamentary issue to Alex Verble. Jack Walker and John H. Verble were taxed with the cost. Walker appealed to the Circuit Court. John H. Verble did not appeal. In the manner indicated by what proceeds, the controversy got into the Circuit Court. November 28, 1911, Jack Walker filed a plea styled a "plea in abatement in the Circuit Court to the jurisdiction of that Court over the subject-matter contained in the petition of Alex Verble" and all other records and matter pertaining to the contest of the wills executed January 20, 1902, in so far as said Alex Verble seeks to contest said will or is ruled or permitted by the Court to do so. The plea contains nine grounds and is

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sworn to. Reduced to their legal substance, the plea raises these questions:

1. Alex Verble does not show in his petition that he is an heir of Elizabeth Bartlett or distributee of her estate, or would be, if she had died intestate.

2. In his petition he does not seek a contest of the will of January 20, 1902, and the codicil thereto of date August 25, 1904, but only seeks to set aside their probate in common form before the County Court, as well as to set aside the probate of the codicils presented by J. H. Verble, and that the will offered by him be probated instead and that letters testamentary be issued to him.

3. His petition presents no ground upon which to contest the will of 1902 and subsequent codicils thereto.

4. The petition does not show that Alex Verble and D. A. Verble are one and the same person.

5. The County Court Clerk fails to certify to the Circuit Court that the will of January 26, 1902, and the codicil probated therewith, or the codicils probated by J. H. Verble, are contested, or that a probate of either is sought in solemn form, as required by statute.

6. Alex Verble failed to execute bond for \$500.00, payable to the executor, Jack Walker, in the County Court as required by statute.

7. The Circuit Court is without authority to hold the petition in it, thereby adjudging that they are sufficient to present a contest of said will and the codicils thereto.

Walker puts in a similar plea to the petition of J. H. Verble.

J. H. and Alex, or D. A., Verble moved to strike this plea from the files, setting up five grounds in support of the motion and the motion was sustained. Walker excepted and prayed an appeal to this Court, and his prayer was overruled for the present.

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Walker also moved to dismiss the petitions of Alex and J. H. Verble on grounds similar to the grounds stated in his pleas in abatement. His motion was overruled and he excepted and prayed an appeal to this Court and his prayer was declined for the present and exception was taken. His motion to dismiss was made after the action of the Court in the pleas in abatement.

At this stage in the proceedings, the parties respectively presented their wills with the codicils thereto, each averring that the papers presented by him constituted the last will and testament of Elizabeth Bartlett and each denied the contention of the others as to what was the last will of said Elizabeth Bartlett. It appears that the cases were by agreement consolidated and heard together. Walker moved to strike out all the pleadings or the issues offered and tendered by J. H. Verble and D. A. Verble, on the ground that he, Walker, had tendered an issue averring that the will probated by him dated January 20, 1902, and the codicil thereto dated August 25, 1904, and probated in the County Court, constituted the true, whole, and last will of said Elizabeth Bartlett, and that the defendants, Alex and J. H. Verble, joined issue on the same by pleading the general issue, and his insistence in the motion was that his pleading is the only proper or necessary pleading in the consolidated cases, and that the issues tendered by defendant D. A. and J. H. Verble, are wholly immaterial and present improper issues in the case, and, hence, should be stricken out.

The Court, upon consideration, overruled this motion, and to this action Walker excepted. He thereupon pleaded to the issues so tendered by J. H. and Alex Verble under the orders of the Court. After these proceedings in the Circuit Court, the case was continued until the next term of the Court, the Court holding that the then term was not the trial term.

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It seems that at the next term, or at that term, J. H. Verble was permitted to amend his pleadings, and Walker and D. A. Verble excepted to this action of the Court.

The case came on for hearing upon the issues as presented in the three consolidated cases before the Court and the jury in April, 1912. The record, as it is before us is in four volumes. An immense amount of evidence was introduced before the Court and jury. It consists of the evidence of some 135 or 140 witnesses. Without going into full details it is only necessary to say that the jury found in favor of defendants, as to the writing propounded by D. A. Verble. That is, the jury found that the paper propounded by him was not the last will and testament of Elizabeth Edwards, and they found that the writings propounded by Walker, being the paper writings dated January 20, 1902, and August 25, 1904, as added to and changed by the paper writings and codicils dated January 20, 1909, and November 25, 1909, presented by J. H. Verble, did constitute the last will and testament of the deceased, Elizabeth Bartlett.

This finding, of course, involved a finding that the will and codicil, as probated in the County Court by Jack Walker, did not constitute the whole and entire last will of the deceased. Jack Walker moved for a new trial as to that part of the verdict of the jury, which found the issues in favor of the paper writing propounded by J. H. Verble and the verdict of said jury against the paper writing propounded by him.

D. A. Verble moved the Court for a new trial as to the verdict of the jury, on the ground that the paper writing propounded by him was not the last will and testament of the deceased. These motions were continued over until April 10, 1912. On this date, Alex, or D. A., Verble, moved the Court to grant him a new trial in the

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consolidated causes, stating nine grounds in support of his motion. These grounds will be noticed further on in this opinion in so far as the assignments of error of Alex, or D. A., Verble present them.

Walker moved the Court for a new trial, stating ten grounds in support of his motion. These grounds will also be noticed in this opinion in so far as brought forward by his assignments of error.

The Court overruled the motion of Walker and Alex, or D. A., Verble for a new trial, and, as before stated, exception was taken to this action of the Court. These parties also moved in arrest of judgment and the motion was overruled and exception taken thereto. Upon the finding of the jury, the Court rendered judgment to the effect that the writing propounded by D. A. Verble as the last will and testament of Elizabeth Bartlett, bearing date January 12, 1911, and admitted to probate by the County Court of Putnam County, is not the last will and testament of said Elizabeth Bartlett, and he set the probate thereof in the County Court. He adjudged that the paper writing propounded by Jack Walker as the last will and tesatment of Elizabeth Bartlett bearing date January 20, 1902, and August 25, 1904, as added to and changed by the paper writings and codicils dated July 20, 1909, and November 25, 1909, presented by J. H. Verble, were the last will and testament of the deceased. His clerk was ordered to make out and certify a copy of the judgment and entry as to said will and codicils propounded by John H. Verble, and to transmit the same with the original will and said original codicils to the County Court of Putnam County to be there recorded as required by law, as the last will and testament of Elizabeth Bartlett bearing date January 20, 1902, and August 25, 1904, and admitted to probate in the county of Putnam on the ——— day of

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_____, 1911, and he vacated and annulled the probate in the County Court.

To this action of the Court, Walker and Alex Verble excepted.

His Honor was of opinion that the contest in these consolidated cases on the part of Jack Walker and Alex Verble and the propounded will and codicils offered by Walker and the propounding of the paper writing by Alex Verble as the last will and testament of the deceased, were in good faith on the part of Walker and said Verble, and he adjudged one-half of the cost of the Court in the consolidated cases against Jack Walker and one-half against D. A. Verble and that the costs so adjudged should be paid out of the estate of the deceased if the same could be collected out of it.

His judgment accordingly proceeded to the effect that John H. Verble recover of Alex Verble and his surety one-half of the costs in the consolidated cases and that the same be paid out of the estate of the deceased, if the same could be made out of it, and that if it could not be collected out of the estate, the same be collected from Alex Verble and his sureties.

To this action of the Court, Walker and John H. Verble excepted. He proceeded to render the same judgment in favor of John H. Verble against Walker and his sureties, and to this action of the Court, Walker and D. A. Verble excepted. To all the actions of the Court in overruling his motion for a new trial and his motion in arrest of judgment and overruling his objections and exceptions to evidence offered or admitted in the trial, and in taxing him with any of the costs, and on all other questions and orders and judgments, Walker excepted and prayed an appeal in the nature of a writ of error to this Court, which prayer was granted.

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By agreement of the parties, it was ordered by the Court that one bill of exceptions made out by appellants, or either of them, should be a sufficient bill of exceptions for both Jack Walker and Alex Verble.

To the action of the Court in adjudging that the costs adjudged against Walker and the costs adjudged against Alex Verble in these cases, be paid out of the estate of the deceased, John H. Verble excepted, and prayed an appeal to this Court, which was granted, and the clerk of the Court, in making out a transcript of the record on said appeal by John H. Verble, by agreement it was ordered that the clerk should not include in said transcript anything except the technical record; that is, the said clerk should include in said transcript on said appeal of John H. Verble, a transcript of the record as filed in the Circuit Court by the clerk of the County Court of Putnam County and all process in the causes, a copy of the different paper writings purporting to be the wills and codicils as propounded by Walker for probate and as propounded by John H. Verble for probate and as propounded by Alex Verble for probate, and all the pleadings in the causes and other matter appearing on the minutes of the Circuit Court, and John H. Verble was given thirty days in which to execute an appeal bond as required by law and his bond when filed was to be and constitute a part of the record.

Walker excepted to this judgment and all other judgments and orders in the case and prayed an appeal, it being the intention of said Walker, says the record, to take a broad appeal from every order and judgment in the cause.

It appears that John H. Verble, by his attorney, appeared in the Court below and moved it to allow him reasonable compensation to his attorneys, naming them, for their services in helping him in the causes, which causes originated in the County Court in setting up the will which

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was brought and propounded by him for probate, and which was set up in these cases in the Circuit Court as the last will and testament of Elizabeth Bartlett, the fee or compensation of his attorneys not having been heretofore agreed upon. This motion was allowed by the Court. In other words, the Court ordered and adjudged that said Verble be allowed reasonable attorney's fees for the services of his said attorneys and that the same be paid out of the estate of Elizabeth Bartlett, deceased. To this action Walker excepted and also Alex Verble.

It seems that Alex Verble appeared in Court and moved for reasonable counsel fees to be allowed him and for a reference in the case to the Clerk to ascertain by proof what was a reasonable attorney's fee for his attorney, and that the clerk be ordered to report on this matter at the next term so that the fee allowed his attorney might be taxed in the bill of costs and paid out of the estate of the deceased. His Honor, the Circuit Judge, held that Alex Verble was entitled to have reasonable attorney's fees paid out of the estate of the deceased as part of the costs in the case, but refused to allow the motion for a reference, for the reason that the executor had not qualified and because, likely, the fee could be agreed upon with the executor when one qualified. Walker excepted to this action of the Court, and Alex Verble excepted to the action of the Court in refusing to refer the matter to the clerk to ascertain what would be reasonable fees for his counsel at the present time.

The appeals prayed were perfected and the parties appealing have assigned errors in this Court.

The natural order to pursue, it seems to us, in disposing of the errors assigned by appellants, is first to take up those of Walker, nine in number.

His first, second, third and fourth can, in our opinion, be dealt with under one general head or proposition. They

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all, in their final analysis, raise the question that the Circuit Judge of Putnam County, in view of the manner in which the controversy as to the last will and testament of Elizabeth Bartlett came to it, was without jurisdiction to settle and determine the controversy under an issue in its essential legal nature, an issue of *devisavit vel non*.

It is argued, in the first place, with much force and earnestness that the County Court of the county had no power to revoke the probate of the original will made by Elizabeth Bartlett and the codicil thereto upon the application of J. H. Verble and probate the codicils presented by him as parts of her will. The central idea of the argument is, that all the County Court had authority to do, if proper pleadings thereto were filed and bonds given, was to certify the papers to the Circuit Court for an issue to be made up in that Court to settle what papers constituted the last will of the deceased under the Act of 1835, Chapter 6, Shannon's Rev., section 6027.

The County Courts of this State have original jurisdiction in the matter of probating wills and in granting letters testamentary and of administration and the repeal and revocation thereof, and as to these subjects, County Courts are not inferior Courts in the common law acceptance of that term.

Under the statute, the County Court revoked the probate of the will and codicils presented by appellants Walker and J. H. Verble, and Walker appealed to the Circuit Court. He raised no question as to the jurisdiction of the County Court in the proceeding of J. H. Verble, and it seems that his objections presented to the petition of Alex, or D. A., Verble was not that it had no jurisdiction at all to revoke the prior probate granted by it, but that it had no jurisdiction to do so at a subsequent term.

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Now, what was the situation presented in the Circuit Court after these appeals by Walker to it? If his appeals effected anything, it was to carry the question of the revocation of the probate of the will and codicil presented by him to the Circuit Court. The Circuit Judge, properly disregarding mere form and technicalities, decided that the question as to the papers constituting the last will and testament of Elizabeth Bartlett should be finally settled in his Court under an issue of *devisavit vel non*. To this end he properly, as we conceived, dismissed the petitions of J. H. Verble and Alex Verble and under a writ of *certiorari* ordered the clerk of the County Court to send up all the papers and records in relation to the probated action of the County Court to his Court, to the end that proper issues to test the question of what papers constituted the last will and testament of Elizabeth Bartlett be settled in his Court, and her true and last will be probated in solemn form.

There is nothing in the contention that the Circuit Judge erred in requiring each party to propound the will presented by him. Assuming that the whole question might have been settled under a propounding of the will first made by the deceased by appellant Walker, still the action taken by the Court requiring each party to propound his will did not change the essential legal nature of the proceeding.

Now the pleas in abatement and the motion to dismiss entered by appellant Walker are settled under the views just herein expressed, and, in our view, it is a matter of no consequence whether his pleas in abatement should have first been presented in the County Court, or at the first term of the Circuit Court, after the controversy reached that Court. It follows, if the views herein expressed be sound, that the first, second, third and fourth assignments

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of error of appellant Walker must be overruled. In coming to the conclusion just stated, we have not overlooked the various authorities cited by the able counsel of appellant Walker. It is sufficient to say that in our opinion they are not relevant and controlling with reference to the process and final legal question raised by these assignments of error.

The fifth and sixth assignments of error presented by appellant Walker may be disposed of together. They simply raise the question that the verdict of the jury sustaining the codicils presented by J. H. Verble is not warranted by the evidence and that the evidence in their favor did not preponderate in favor of the verdict. It is to be noticed that none of the assignments of error of appellant Walker raise any question against the charge of the trial Judge to the jury, nor any question as to the admission or rejection of evidence. An examination of the evidence in the record certainly presents quite a mass of evidence in support of the finding of the jury, and we are unable to say that the evidence in this respect did not authorize the jury to return the verdict it did.

The seventh assignment of error simply says that the codicils propounded by J. H. Verble were not sufficiently proven and identified. This assignment presents in a somewhat different form the question raised by the fifth and sixth assignments.

The eighth assignment is to the effect that the Court erred in allowing counsel fees and costs to D. A. and J. H. Verble, and in directing that the same be paid out of the estate of the testator.

The law seems to be well settled that if J. H. and D. A. Verble had wills of the deceased which appeared to be regularly executed and in which they were interested or nominated as executors, it was their duty to present them

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for probate, and, in such case, if they acted in good faith, they are entitled to counsel fees and costs.

The last assignment of appellant Walker is, that the Court erred in refusing him a new trial upon the grounds set forth in his motion. This assignment of error, of course, is covered by what has heretofore been stated. While there is no attack in this record by witnesses upon the character of Mr. Walker and his integrity, he nevertheless does not present himself in this record in an entirely acceptable light. The proof in the record shows that at the time he hastily probated the will and codicil thereto, in which he was nominated executor and in which the bulk of the estate of the deceased was given to him on the evening after the burial of the testatrix, he knew of the existence of various subsequent codicils made by her, or at least claimed to have been made by her in the possession of J. H. Verble, and this fact he failed to call to the attention of the County Court when he had his will hastily probated therein.

It appears from the evidence that the codicils presented by J. H. Verble were not only known to him to be in existence, but their contents were discussed by him and J. H. Verble before the death of Elizabeth Bartlett.

Candid conduct on his part, in view of these facts, ought to have suggested to him the propriety of having J. H. Verble and D. A. Verble present when he probated his will, and there is considerable evidence in the record tending to establish the fact, and which in our opinion does establish the fact, that, on the occasion of the burial of Elizabeth Edwards it was agreed that he and the Verbles should, at a near day in the future appear at Cookeville for the purpose of presenting her will or wills and codicils for probate, and this agreement, he, in the action taken by him, directly ignored. But, as before

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stated, there is evidence in the record which tends to show that Mr. Walker believed that these subsequent codicils to the will of Elizabeth Bartlett were forgeries, and this from his standpoint furnished in a sense an excuse for his failure to call to the attention of the County Court the fact of the alleged existence of all these alleged codicils. These questions, however, were fairly submitted to the jury under the evidence by the trial Judge.

We desire to say, in this connection, that J. H. Verble does not present himself in a very commendable light in this record. There is proof tending to show that on an occasion before Elizabeth Bartlett died, he approached a gentleman and a friend of the old lady and asked him to get the old lady to make a will in his, J. H. Verble's, favor. This gentleman, of course, declined to participate in any such illegal and objectionable scheme. It is due to J. H. Verble to say that he states that if he ever made any such request, he was drunk at the time and that he has no remembrance of it. The gentleman to whom he made the request also testifies that J. H. Verble was under the influence of intoxicants at the time. He does not state just how drunk he was. It is fair to infer, however, that J. H. Verble was considerably under the influence of whiskey, or some other intoxicant. His relation to the codicils presented by him was submitted to the jury in view of all this evidence.

Now, recurring to the contention of appellant Walker that the codicils presented by J. H. Verble were prepared by him and that the name of the testatrix thereto was signed by him, it is only necessary to say that under the authorities a testatrix or testator to a will may request a party to sign his or her name thereto. The essentials involved in the validity of a will is its execution by the testator or testatrix and his or her knowledge of its con-

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tents. If this appears to the satisfaction of the Court or jury trying the issue, the question is settled.

In other words, the beneficiary has the right, at the request of the testator or testatrix, to sign his or her name to his or her will. The fact, however, creates a strong suspicion, and it should be made to clearly appear that the paper propounded as his or her will was actually known to him or her and that its execution was his or her act and deed. *Crockett v. Crockett*, Meigs, 9425; *McDonald v. McDonald*, 5 Yer., 307; *Stump v. Hughes*, 5 Hay'd, 93; *Jones v. Allenburn*, 11 Hum., 96-98; *Reaves v. Alexander*, 9 Bax., 104.

As before stated, the codicils presented by J. H. Verble, as we have the record, came before the Court under such conditions as required a full and clear explanation of the facts and conditions surrounding their execution. This was made by evidence, and if the jury believed the evidence it is conclusive upon this Court.

Of course it must appear that the testator or testatrix executed the will propounded and that she knew its contents and that she signed it before it was attested by the attesting witnesses.

Authorities, *supra*.

All these questions were thoroughly submitted to the jury, as we may readily assume, because there is no assignment or error predicated upon error in the charge of the trial Judge with respect to these matters.

What has been said and the authorities cited, dispose of all the assignments of error, and the argumentive questions advanced by the learned counsel of appellant Walker. We come now to the only assignment of error that we deem it necessary to notice presented by the learned counsel of Alex, or D. A., Verble, and that assignment of error is directed to the charge of the trial Judge hereinbefore quoted.

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We think this assignment of error is well taken.

The charge of the Judge absolutely destroyed and removed the foundation upon which Alex, or D. A., Verble propounded the will alleged by him to have been executed by the testatrix, Elizabeth Bartlett. The trial Judge, in substance, charged the jury, and in direct language charged the jury, that a will devising real estate must be attested by two witnesses and this is sound law under our statute. But he further charged the jury, in effect and practically in direct terms, that if the will as presented appeared to be attested by two witnesses and one of these witnesses were dead, the living witness could not prove its attestation by the dead witness.

We do not understand that this is a sound announcement of the law. On the contrary, we take it that if a will is presented, signed or apparently signed, by two attesting witnesses and one of the attesting witnesses is proved to be dead or without the jurisdiction of the Court, that the living attesting witness may prove that the dead witness signed the will in the presence of the testator, or if the living witness cannot prove this, the due execution of the will may be proved by proving the handwriting of the deceased witness. Authorities, *supra*; Wigmore, Ev., Vol. 3, 2049.

This question, we take it, has been thoroughly settled by the authorities. Mr. Wigmore, in his learned treatise on evidence discusses this phase of the question and thoroughly settles the rule in accordance with what has just been stated. We hereunder cite other authorities in support of the rule here declared.

The principle is, that a will must be executed in accordance with the requirements of the law, or the statute governing the question. But the proof of its execution in accordance therewith is an entirely different question. It

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results that all the assignments of error, except the one indicated presented by Alex, or D. A., Verble and his learned counsel must be overruled, but the sustaining of his assignment upon the ground stated, necessitates a reversal of the case, and its remand to the Circuit Court of Putnam County for a new trial, and this assignment opens up the whole question as to what paper or papers constitute the last will and testament of Elizabeth Bartlett, deceased, and it is so ordered by this Court.

In view of the peculiar nature of this case as it appears on the appeal of it to this Court, we can only say that the costs of the appeal should be paid out of the estate of the deceased, Elizabeth Bartlett, and it is so ordered.

F. H. HARRIS AND WIFE V. NASHVILLE TRUST COMPANY.

Affirmed by Supreme Court, at Nashville, 1913.

1. LIBEL. *Testamentary libel. Action against estate.*

A party who is libeled by a testator in his will which is duly probated may maintain an action of damages therefor against the estate of the testator.

2. STATUTE OF LIMITATIONS. *Publication.*

A party thus libeled may treat the probate of such will as a publication of the libelous matter and can maintain an action within twelve months from probate, notwithstanding the will was executed some years preceding the death of the testator.

3. PUBLICATION OF LIBEL. *New or second publication.*

A party who is libeled may treat a new or second publication of the article as the beginning of a new cause of action, and the statute of limitations will run from this last publication, and not from the first one.

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4. SAME. *Dictating or delivering of will to an attorney.*

The dictating of a will containing libelous matter to an attorney, to be kept by him professionally until after the death of the testator, is not a publication until the opening and making public of the will by such attorney.

5. DEMURRER. *Motion to dismiss. Practice.*

When a motion to dismiss plaintiff's suit is equivalent to a demurrer to the declaration it will be so treated, and the declaration will be tested as if it were on demurrer.

FROM DAVIDSON COUNTY.

Appeal in error from Circuit Court of Davidson County.

STOKES & STOKES for Plaintiff in Error.

PARKS & BELL for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

IN 1910 one R. H. Woodfin died in Davidson County. Soon after his death the defendant in error, whom we shall call the defendant, went before the County Court of the county and propounded for probate a will executed by Woodfin a number of years before his death. Defendant was therein named executor. A part of this will consisted of a codicil executed in May, 1901, in which the following language with reference to Mrs. Harris was used:

"And this sum of two hundred and fifty (\$250.00.) dollars to John Woodfin, one dollar (\$1.00) to William Woodfin, and one dollar (\$1.00) to Cleo Woodfin, the illegitimate children of my brother, James Woodfin, is all they are to have of my estate."

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The Cleo Woodfin above named was the niece of the testator and was then quite a young girl and has since intermarried with and is now the wife of her co-plaintiff, F. H. Harris.

It is averred in the declaration in this suit that this codicil was written either by the said Woodfin in person or by counsel and that it was attached to the original will and was not made public and was not intended to be made known or published to anyone other than his counsel until after the death of the said Woodfin, and that said codicil was, pursuant to this understanding subsequently presented to the Court and was admitted to probate and spread upon the record. These averments are followed by the allegation that the charge of illegitimacy was as to Mrs. Harris false and so known to Woodfin and that he willfully and maliciously stated and published the same for the purpose of venting his spleen in having her humiliated and disgraced by the subsequent spreading of the charge upon the public records. The defendant Trust Company was sued in its representative capacity as executor of Woodfin. No attempt was or is made to hold it personally responsible. It is a suit in other words directly against the estate of the testator for the libelous statement contained in the codicil.

A motion to dismiss was interposed in the Court below and it was sustained. A question of practice with reference to this motion was raised in the brief of appellants, but it was agreed by counsel at the bar that the motion should by us be treated as a demurrer and that the right of the appellants to maintain this action should be considered as challenged from every angle by the defendant. This agreement of course obviates any discussion of the point of practice raised. The learned trial Judge was of opinion that the action was not maintainable. Plaintiffs

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took exception and are prosecuting this appeal. The assignment of error made is that the Court erroneously sustained the motion or demurrer which challenged the right of action. Three questions, or rather three phases of one vital and material proposition, arise for discussion, namely, the barring of the action by our one-year statute of limitations, which involves the determination of the exact time at which the publication of the libel took place; secondly, the abating of any right of action accruing to plaintiffs; and, thirdly, a determination of the point of time at which the right of action of plaintiffs if any they did have accrued.

Two of the propositions can be disposed of at least provisionally with very little trouble. It is conceded that this suit was instituted within twelve months after the will was offered for probate. If it be here and now determined that there was a publication of the libel at the time the codicil was written, the one year statute of limitations bars the plaintiff's action.

After a careful and painstaking investigation we have reached the conclusion that, taking the averments of the declaration as true, there was no publication of the libel until the codicil was offered in the Probate Court, or that plaintiffs can treat it as a publication as to them. It is true, as stated by learned counsel, that the Courts are almost unanimous in holding that the dictating of a letter or communicating matter orally to a stenographer amounts to a publication. The New York Courts take a different view, or at least they do not accept the proposition as an all-prevailing rule. But no authorities are adduced to sustain the contention that a communication to an *attorney* of matters to be transcribed and kept by him as a professional secret until the happening of certain events is a publication by the declarant. It has been expressly held

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otherwise by the English Courts. See *Edmonson v. Birch*, 1 British Ruling Cas., 452-3; and this is the only logical view that can be taken of it if consideration be given to the well-nigh universal custom and understanding of English speaking peoples. It is as it were a retention of the document by the man himself; or it may be looked upon as a writing delivered to an oath-bound agent with instructions to make it public at a certain time or upon the happening of an event which will surely happen.

Anyhow, the date of the publication of a libel made public by an instrumentality other than the libeler can for juristic purposes be fixed as of the time of the exhibition of the libelous matter by the agency which was constituted for that purpose. If libelous matter be communicated to an agent with directions to make it public at a certain time, the libelled party may predicate his suit upon the application made by the agent: Newell on Defamation, 243.

The statute of limitations as a defense may also be met by the universally accepted proposition that an authorized repetition or second publication of libelous matter affords in itself a right of action: 25 Cyc., 370, and cases cited. The executor certainly carries out instructions when he presents to the public a libelous document evidencing his source of authority.

The most formidable objections which plaintiffs have to combat are those who are embraced in and arise out of the proposition that any right of action which they had or can be conceived to have had abated upon the death of Woodfin. A cognate insistence is that a right of action such as exhibited by plaintiffs, that of a libel suit against a dead person, is unknown to the law, that it is foreign to the jurisdiction and to the forms of Courts and the law, and that plaintiffs are now without remedy. We

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are solemnly reminded that plaintiffs are without statute or precedent and that the doctrine urged is new, strange, strained and far-fetched, and we are also told that it is our duty to refrain from making law.

We have been duly impressed with these considerations. We are aware that we, as it were, are in a trackless forest; that so far as the diligence of counsel and ourselves avail, no Appellate Court and no text-writer upon the law has in published volume dealt with the question; and one *nisi prius* Court only has ever so far as we are aware had the question presented. The opinion of that Court and a short review of it will be referred to later.

The absence of authority and the strangeness of the doctrine are matters not to be overlooked. We at the same time have been gravely concerned for the plight in which we find Mrs. Harris, and feel that she should not be turned away from the temple of justice remediless unless constrained to do so by well defined rules of law. The absence of precedent, as observed by Judge Grosse in *Palsey v. Freeman*, 3rd Term Rep., creates some doubt as to the sustainability of any action, but it is not for that reason alone that she should be repelled. It was remarked by the learned Judge who delivered the opinion in the case of *Allen v. McCune*, 42 Am. Dec., 606, that if a clear invasion of right be shown, the Courts do not like to see the complaining party knocked down at the threshold by mere technical objections.

Accepting the allegations of the declaration as true, Mrs. Harris has been grievously wronged. Among Anglo-Saxon peoples there is hardly any greater possession, especially upon the part of a woman, than the consciousness of having been born of a lawfully wedded pair. The imputation to the contrary is a blot upon a fair name which it takes more than a generation to remove. A denial to

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her of the right to prove the falsity of this charge will cause an anguish that neither time nor wealth can wholly extinguish.

It is universally admitted that reputation is of inestimable value. Blackstone treats it as a natural and in-born right. Austin regards it rather as an absolute right. He discusses it under the head of rights *in rem*, regarding it as a thing to be lost, stolen or taken away. All governments with any sort of system of jurisprudence provide some means of guarding it from assault and vindicating invasions of the right. If therefore plaintiffs in this case are to be repelled, the defendant should be able to convince us that the law affords her no remedy.

As has been anticipated, learned counsel for the defendant concede that in general a libelled party has a right of action, but that in the instant case the right which Mrs. Harris had or was supposed to have had abated by the death of Woodfin. The maxim, *actio personalis moritur cum persona*, is relied upon as a conclusive answer. This maxim of the common law is binding upon us except to the extent modified by statute to be hereinafter noticed. But there is another maxim of the common law of more universal application and almost as cogent, namely, that the law will not suffer a wrong without a remedy; *ubi jus ibi remedium*. We learn from Lord Coke that the maxims of the common law are binding upon the Courts as succinct statements of its rules; but we are yet to learn that any maxim hoary with age and out of joint with modern times is to be stretched so as to overrule and override another maxim of equal age and of far greater harmony with the spirit of these days.

It was the observation of Lord Holt in the celebrated case of *Ashby v. White*, 2 Lord Raymond, 593, that it was a vain thing to assert that a suitor had a right and yet that

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he was without remedy for its invasion; and that if rights were apparent it was the duty of the Court to decide his controversy according to the spirit of the common law, notwithstanding it may never before have been heard of in a forum. A similar statement of the rule is to be found in the opinion of the scholarly Turley in our own case of *Jacobs v. State*, 3 Hump., 514. It was said by Judge Turley that the common law of a country was never stationary, and that hundreds of the principles of the common law might lie buried for ages untried and unused simply because the occasions for their application had not arisen. The common law should be looked upon as a spirit and not as a letter or a form. Baron Pollock symbolizes this spirit as a fairy in the perpetual quest of Justice, the Beloved. The common law Courts have not hesitated to discard old and absurd doctrines when they stood in the way of justice and advancement; and it would be a reproach to the jurisprudence of the State in this day of progress and enlightenment to permit a maxim which is a relic of barbarism to stand as an insuperable barrier to a party who has suffered an outrage of scarcely less enormity than that of death itself. Especially is this criticism deserved if the maxim be stretched beyond its real legal significance and purpose.

The charge that the Court, if it sustains this right of action, will have to make the law instead of declaring it, will upon closer analysis be considered as unfounded. This imputation has been hurled at the common law Courts for more than a hundred years by men of the greatest force and learning, but the Courts continue as before the mouthpieces and exponents of the juristic thought of their time. In the absence of statute or well-settled legal rules the Courts do not, in their efforts to achieve justice, make the law; they rather *discover* it: Jenks, Law of Middle

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Ages, 65. The Courts ascertain and point out rights instead of creating them.

We are reminded by Lord Coke that innovations are to be looked upon with suspicion, and are admonished to adhere to the beaten path. This declaration of the oracle of the common law cannot be overlooked. But he also laid it down as a satisfactory rule that if any proposed action, however new, could be sustained upon well-known principles, rules and maxims of the common law, it should be accepted whether it had ever been presented for decision or not. If the doctrine urged by learned counsel and as sustained by Lord Coke when he railed at innovations had been accepted as the rule, the common law would remain as a reproach to our ancestors. Instead, because it is an ideal and a spirit, and not a concentered mechanism, it is today the most satisfactory system of jurisprudence in its administrative and practical side the world has ever seen. The Courts of Tennessee are supposed to be governed and guided by that spirit, except where otherwise provided by statute. Indeed, the duty of administering right and justice according to the principles of this system are obligatory: Shannon's Code, section 6063.

In the investigation of the question presented we have felt at liberty to pursue a wide range. We may be charged with attempts at essay writing and with over-strained and over-refined reasoning and an undue stretching of some of our conclusions beyond our premises. To this impeachment we shall make no response. We hope we can find our pardon in our anxiety to make our Court an instrument for the effectuating of justice and the redress of grievous wrongs. Unfortunately, some of the most short-sighted individuals in the world have been upon the reviewing Courts of England and America. They have flatly refused to enter the wide field of right and justice un-

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less they be shown the tracks of some one in authority who has gone before him. But the world is to be congratulated that in times past some Judges of a wider range of vision have written for posterity. We are also indebted to those who are not lawyers for some of the most splendid juristic conceptions ever conceived in the mind of man. The Courts of today are not confined to the black letter of the law, but are at liberty to levy tribute upon the whole world of experience, letters and philosophy as aids for the ascertainment of truth and justice.

We are also told that it would be dangerous to establish a precedent of this kind, for the reason that suits would be multiplied, estates endangered and the good of society interfered with. Society can demand a great deal of the individual; but society should not at the behest of the sociological jurist be required to sacrifice a most invaluable and inalienable right for a supposed social good. This contention is not sound. Society itself could not exist as we know it unless good character were something. And society will ultimately find its greatest good in attending to the rights, wants and desires of the individual.

We shall now proceed to an examination of the defense predicated upon the maxim *actio personalis*, assuming for the time that it must be dealt with and overcome before plaintiffs can proceed. We shall undertake later to show its inapplicability to the facts of this case.

The origin of the maxim is unknown. Sir Frederick Pollock characterizes it as a relic of barbarism: Torts, 6th Ed., page 60. It was stated in *Finlay v. Chirney*, 20 Queen's Bench, 503, that its origin was unknown. It is appropriate that we briefly trace its history and development, supplementing with our own views some of the observations made by judges and jurists. In the days of self-help, vengeance, retribution and clan punishment, and

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likewise in the days of trial by battle, no other conclusion could have been reached than that all rights of action were taken away by death. This view of the early Courts was strengthened from age to age by the peculiar customs and institutions of our ancestors. It was shaded and influenced by feudal tenures and latterly by the assumption by the priests of the right to disburse the funds of decedents. It was also strengthened by the peculiar doctrine that the goods of a dead man could not by his personal representative be used in the payment of damages occasioned by his torts. The maxim was also influenced by the religious awe and superstition of the age. But the first authentic declaration of a juridical reason of which we are aware was that no right of action could be transferred.

For nearly two hundred years the maxim has been fought and criticized and restricted, both by the Legislatures and by the Courts, until as now said by Lord Bowen in *Finlay v. Chirney, supra*, the accepted rule is that all actions survive and that the abating of actions is the exception. This maxim has been so reduced in Tennessee as to apply to actions for injuries affecting the character only of the plaintiff: Shannon's Code, 4569. See the strictures of Mr. Street upon the maxim in the third volume of his treatise on the Foundations of Liability, page 62, *et sequa*. We have examined quite a number of decisions and not a few pages of text-writers concerning the application of the maxim. It is now the accepted rule that the maxim will be looked upon with disfavor, and that it will not be applied unless the facts necessitate it, for the Courts realize that it has been an instrument of injustice ever since the day when the adjustment of wrongs was effected by other means than those of physical violence. The Courts could almost be justified upon common law

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principles and in the absence of statute in discarding the maxim, for the reason of the maxim or the views and sentiments which gave it force are no more. For, as observed by Lord Coke, the reason of the law is the life of the law. We have the warrant of Lord Mansfield in the case of *Hanley v. Trot*, Cowper's Rep., 371, that the maxim is not to be accepted as generally and universally true, and that it becomes the duty of the Court to scrutinize the cases in which it is urged, to the end that it be not used as an artificial weapon for the defeating of justly-founded claims.

What has immediately gone before has been set down by us as justification for the position taken by us in the instant case for holding, after a careful and deliberate consideration, that the maxim cannot be used by the defendant to defeat this action of the plaintiffs. We are of opinion that the facts do not call for its application, and being of this opinion, we would certainly be subject to reproach if we stretched this archaic and barbarous rule beyond its true scope. Courts are supposed in a republic to be instrumentalities for the attainment of justice. This, of course must be done under rules and regulations and an orderly procedure. At the same time, they cannot ignore the spirit of these times, when everything is questioned, and especially when Courts are brought to the bar of public opinion for the purpose of ascertaining whether they subserve the ends for which they were constituted. Charles Ferguson is the author of two interesting and profound works, the *Affirmative Intellect* and the *Religion of Democracy*. It is the duty of society, says he, to attend to the desires of the individual and his yearning for justice and fair treatment, and not to let mere forms and externals be the means of baffling the individual in his search for satisfaction and justice. L. F. Ward in his *Psychic*

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Factors of Civilization, in Chapters 5 and 35, says that society cannot escape the duty of attending to the desire of the individual to get rid of his pain and sense of wrong, and that this is especially a duty resting upon those departments having to do with the protection of rights and vindication of wrongs. We learn from Nietzsche that a German jurist claimed that the ideas of justice and right were founded upon what are characterized as the feelings of resentment, those feelings which cause the individual to direct his anger toward the party responsible, and that it was the duty of society through its organs to ascertain the grounds of these feelings of resentment, and if they were well founded and properly referred to their author by the injured one, responsibility must be fixed by society and restitution ordered, and that purely artificial barriers should not stand in the way of society thus responding.

These views are mentioned by us for the purpose of showing that Courts if they are not to be remiss in the performance of their functions, cannot ignore the spirit of justice nor close their ears to the cry of an injured individual for an opportunity to be heard and to be vindicated.

It is well that we ascertain exactly what was intended by the testator when he executed his will and what his agent the executor did when the will was propounded and to blend these matters of fact with their jural aspects.

Woodfin intended to libel his niece, conscious of the fact that neither she nor the world would know of it until after his death. There was a command by him to his executor to take the libelous document and present it to the Probate Court of Davidson County and make it known to the world as the evidence of the thought, will, wish and desire of the testator. It was known to the testator that his declaration to counsel or to the executor would be pre-

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served as a secret and that it would not become effective and operative as the instrumentality with which he could glut his vengeance by blasting Mrs. Harris until the same should be made known through the channels provided by law. Stripped of everything, it was a command to his executor as such and in the execution of the will of the testator and for the purpose of gratifying a fiendish desire of his own, to go before the public after the testator's death and scatter abroad the seeds of destruction contrived for his niece.

It can hardly be disputed that in propounding the will for probate the executor acted as agent, trustee or representative of the testator, and that he carried out in so doing a specific instruction. At this stage of our investigation it becomes pertinent to ascertain the exact time at which Mrs. Harris was injured and her feelings of outrage, resentment and injustice generated. The discussion of the authors immediately above cited afford aid in the ascertainment of this point of time, for the reason that it is clearly deducible from the juristic schemes suggested by them that it is important to determine the time when the organs of society can be invoked for remedying purposes.

A document does not become a libel until publication thereof. It can be differentiated from an assault and battery or an intent to commit a crime, in that a man may set down in writing a false charge of the most heinous nature and it will not be or cannot be classified as a libel or any part of a libel until made known to others. The libelous matter contained in Woodfin's will did not become a libel in the legal sense until after his death, when pursuant to his direction it was then declared to the world. *Dawson v. Holt*, 11 Lea, 583, is apposite in this connection. It cannot be said that the good reputation of Mrs. Harris was even assaulted or attacked by Woodfin by the

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writing of the codicil; it cannot be said that he poisoned an arrow or lighted the fuse of a bomb and died before the arrow struck or the bomb exploded. These suggestions cannot be urged in our humble judgment for the purpose of showing that the tort was one and inseparable, that it began in the lifetime of the deceased, and that a fraction of it only remained to be performed after his death, and that his death abated or took away any right of action which the injured party may have had. The instant case rather should be assimilated to that of a man who arms another with a bludgeon and instructs him upon the happening of a certain event to attack and slay a person against whom the procuring party has a grudge; or it may be likened to the case of a man who knows that he cannot be in the vicinity of his victim at a time when he desires the destruction of the latter, and commissions a third party to assault and rob or slay the victim at a time pointed out or suggested. In these latter cases it cannot be said that in the law any part of the harming deed was done until the blow was struck. And yet, the deed ought in every respect to be treated by society as the deed of the party who commanded it, although it was not performed by him until after his death.

When did any cause of action accrue to Mrs. Harris? Certainly not before any injury was, in the legal sense, done her. Assuredly it was not until the public was made aware of the imputation upon her legitimacy and until she became conscious of the fact that the atmosphere in which she lived and moved had been poisoned by someone. She could not have sued the testator in his lifetime, for she could not have compelled anyone to divulge the contents of the will. And it must not be forgotten that Woodfin's will had no force or validity and was not so intended until after his death. It was also intended by him, we repeat,

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that the attack upon her good name was not to take effect, was not to perform its fiendish purpose, until after he had passed beyond. At this point the definition of a will under the Roman law as given by Ulpian and translated by Dr. Cooper in his notes to his Justinian is appropriate: "A will is the declaration of a desire or state of mind made in the presence of lawful witnesses, to be made *known* and have *effect* after the death of the testator." At the expense of repetition we must say that Woodfin composed this libel as a part of his testament, and directed that after his death it be made known and to have *effect* as a libel after his death and when probated.

Where is the logic of the proposition that the law takes away by the death of the wrongdoer a right of action which had not at that time arisen? The feelings of resentment and injustice entertained by Mrs. Harris and her desire now made known to the organs of society that she be allowed reparation and restitution did not arise until the probate of the will; and it strikes us as entirely unsound to say that she must forego her right to vindication by virtue of the maxim *actio personalis*, when in law and fact and so far as the organs of society and herself were concerned no injury had been inflicted upon her.

The maxim has reference to causes of action committed by the tort feazer. It cannot apply to a tort that was not then committed: *Dayton v. Lynes*, 30 Conn., 356. We find this authority holding that the maxim in its terms is restricted to torts committed in the lifetime of the person whose death it is claimed abated the action. In the case of *Hanley v. Trot*, *supra*, it was stated by Lord Mansfield that the rule as a matter of course had reference to torts committed by the testator, and not to causes which did not arise in his lifetime. It was quaintly expressed in "Doctor and Student," an old but very interesting book,

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page 129: "If a man do a trespass and dieth, there shall be no action against his executor," clearly implying that the rule had no reference to a cause of action arising subsequently to the death of the testator. It may be safely laid down as a proposition that cannot be controverted that the maxim cannot be resorted to to defeat a right of action which did not accrue and the effects of which could not in the nature of things have been known until after the party whose representative urges the defense shall have passed away. We must characterize the contention to the contrary to be unsupported either in law, logic or justice.

Upon what ground then shall plaintiffs be debarred of their right of action if this barrier be considered as not in the way? Some surprise is expressed that the Courts can entertain a suit for libel against the estate of a dead person, and argumentatively the Courts are asked to indicate how that is possible under the common law and in view of our statute which makes actions of this nature abatable by death. It must be admitted that this is an action affecting the character of the plaintiff, and that it stands before reduction to judgment as it was at common law, but by this concession it must not be understood that because by the common law of a hundred years or even fifty years ago plaintiffs would have been denied access to the Courts, that in this day of enlightenment and progress and keen appreciation of the rights of the living as against the dead they must be turned away without redress. As was said in our case of *Box v. Lanier*, 4 Cates, 411, the common law is molded by the Courts to suit the ever-changing conditions and demands of justice and of morals and manners of society.

We are of opinion that this action is sustainable upon principles that are not inharmonious with the great body of the rules of the common law, and that in so holding we

shall not be making any law nor repealing any law, but simply responding as an organ of society, because the occasion has now arisen to so declare, in declaring rights and equities to which the plaintiffs are entitled.

We concede that as a general rule the estate of a testator is not liable for the torts of the executor. But we think it clearly deducible from the authorities that when the executor is carrying out strictly and to the letter the instructions of the testator and is performing a deed or making an agreement commanded by the testator, the executor may be sued in his representative capacity for the consequences or because of legal rights arising from the performance of the will of the testator. It cannot well be held otherwise. The law requires him to observe the will of the testator. It can truthfully be said that in thus observing the injunctions of the maker of a will the executor is acting for the estate, for the trust; in fact, that it is the estate or trust which is acting through him. One of our earliest writers—Glanville—says in very few words, that the heir and the executor must perform the will of the testator. In "Doctor and Student," above referred to, it is said that it is the duty of the executor to observe "the will of his testator *as his law*," page 129. Wentworth, a very early writer on executors, states that the law appoints an executor to see that the desires of the testator are carried out, and that if a testator directs a thing to be done the executor must perform it as directed, whether expressly so commanded or not, pages 239-40. We do not see how it can be successfully controverted that the estate of a testator is suable for the injurious consequences of an act which the testator expressly directs shall be done by the executor as an act for and on behalf of the estate.

In *Prince v. Lucas*, 210 Pa. State, 620, it was held that if the trustees of an estate created by will are specially di-

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rected to do a certain thing or to carry out a certain enterprise, and injury results while they act in good faith and in strict observance of the directions of the settler, the estate may be sued therefor. In quite an interesting case in which the opinion was prepared by Justice, now Mayor Gaynor, it was said that the cases are almost uniform, that if in carrying out the expressed intentions of a testator or settlor injury results to a third party, the representative may be sued in his representative capacity therefor: *Kellogg v. Church*, 128 N. Y., 215. In *Ireland v. Bowman*, 130 Ky., 157, the Court held that the estate of a testator might be sued in damages for a nuisance erected in the lifetime of the testator and continued by his trustees after his death, they being expressly so directed in the will. There is in this case quite an analogue to the one at bar if we should treat this as an injury starting in the lifetime of the testator and carried to culmination by the executor by express direction. An interesting review of the English cases upon the question as to when a receiver or trustee may cast the burden of the consequences resulting from performance of the will of the creator of the trust will be found in 2 British Ruling Cases, 413.

There seems to be no contrariety of opinion as to the proposition that the estate may be sued upon all contracts made by the executor when those contracts were made by the express command of the testator. It is also true a party incurring expense at the instance of a testator where it is incurred in the performance of an act or a contract expressly directed by the testator to be made, may sue the estate therefor: *Wade v. Pope*, 44 Ala., 690. Why grant a recovery against the estate of a party who has suffered by breach of contract made by the executor in his representative capacity and deny relief to a party who has

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suffered damages in consequence of the commission of a tort by the executor pursuant to the express command of the testator?

We think it here appropriate to appeal to the civil law, a great system of jurisprudence, for analogy. It is known of all students of jurisprudence that we are immensely indebted to that system and that we in times past and are now borrowing liberally therefrom. See Finlason's Edition of Reeves' History of English Law, Vol. 1. We are aware that the doctrine of torts inculcated by the civil law has been subject to criticism, if not of ridicule, at the hands of juristic writers. Notwithstanding, it must be admitted that it contains an element of truth which those Courts who desire enlightenment from every source cannot deny. The classical jurists place torts under the division of *quasi*-contracts or obligations. Their treatment of the subject is thus: Every wrongdoer knows in advance of the perpetration of his deed that his victim is entitled to indemnity and that the law will require it of him. Therefore when he commits a battery or slanders a person he does so with the implied understanding and promise to the victim that he, the wrongdoer, will tender him satisfaction. In other words, there is necessarily bound up with the conscious infliction of wrong an obligation to pay the injured one a sum. This doctrine has great force as a matter of course in those countries where compensation for injuries is fixed by law. But it has not lost its force in those States where the individuals of a community have entered into a legal relation, one of the implied stipulations of which is an obligation made to and with everyone that if injury be done, restitution will be tendered.

Why not look upon the case at bar in this light? The testator deliberately arranges that his representative per-

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petrate an outrage upon Mrs. Harris. It is inescapable that the executor in propounding the will is dealing out a blow (a part of the estate as it were, or as the Roman jurist might put it, a piece of his mind) that will result in damage to the victim. Where is the violation to proper juristic conceptions in holding that the testator in thus commanding the infliction of wrong impliedly directs that reparation be made, or at least that the consequences be borne by his estate, of which the executor is a mere representative?

In our appeal to the civil law for analogies we could not overlook another doctrine of that system which may have some bearing upon the questions at issue, namely, that of *fidei-commissa*. At a certain stage of Roman law parties were not allowed to give by will property or funds to certain individuals. Testators were then under the necessity of naming an heir or providing for successors. In order to evade the rule above mentioned, they began the practice of devising their estates to a person named as heir or successor, and then requiring him after the death of the testator to hand over the property to the prohibited ones.

Let us assume that Woodfin was desirous of slandering or libelling his niece. We must presume that he knew the law which provides a remedy if he made known his slanderous or libelous thoughts before his death. We may be almost right when we ascribe to him a belief that he could vent his spleen and glut his vengeance by destroying his niece through the instrumentality of a will and that neither he nor his estate could be sued therefor. Is an enlightened Court to confirm such an opinion and let the possessor of murderous venom evade what he supposes to be the law and yet accomplish in the end his diabolical purpose? Quite appropriate in this connection and in connection

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with our effort to show that juristically the executor in propounding the will represents the testator in every sense is reference to an essay written by Hazlitt, an English essayist and profound critic of his age and time. This essay will be found in a volume of his works entitled "Table Talk," under the heading of "Will Making." He expresses astonishment that men will use the instrumentality of a will for the purpose of venting their spleen, and remarks that some sordid, cruel and vindictive individuals keep their wills in reserve as the last weapon with which they will destroy the victims whom they detest. The learned essayist likewise speaks of the unwarranted and unjustifiable commands which some testators lay upon their representatives to be observed by them after the makers of the wills have ceased to breathe. But the most interesting portion of this essay is that wherein Hazlitt refers to executors and heirs as the *proxies* who shall continue on the material stage after the testator shall have passed away, for the purpose of *acting*, executing and effecting the wishes of the maker of the will with respect to some foolish, ridiculous or malicious desire or motive.

Why not in the instant case regard the defendant as the proxy of Woodfin for the purpose of appearing in public and declaring that Mrs. Harris is an illegitimate and thus carry out a design cherished and nourished by him in his venomous bosom for years?

The right to make a will is not a natural one. It rests wholly upon positive law. At the same time it may have been so long continued and permitted by society as to be regarded as a right, as an estate or as an enjoyment. J. G. Fitch, a philosophical juristic writer of Germany, states in his work upon Rights that the owner of property in an organized community should be looked upon as vested with the right to dispose of his property by will and that

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this right may itself be looked upon as property or as a means of securing enjoyment, gratification and pleasure. He also mentions the fact that it may be quite a satisfaction to a man to think that his will is going to be operative in the material world after his death.

It must be recognized in this day and time that the right to make a will is claimed as almost an absolute one, and that some users of this means of disposing of their property resort to this method of projecting themselves as it were beyond death. Unfortunately, the intentions of testators are not always good. Society is now beginning to take cognizance of the fact that wills can be the agencies of harm as well as of good. It behooves Courts administering justice according to the common law to recognize this fact and put the seal of disapproval upon the abuse of this privilege of devising property by a written instrument which may at the same time be used as a weapon of destruction. The Courts would be remiss in our judgment if they failed to notice and weigh the evil consequences with which the unrestrained libeling of parties may be perpetrated by wills. A more permanent way of blasting the good name and reputation of an individual cannot be conceived. In this day of diminishing fear of punishment after death and of the existence of a material hell, and an enlargement of the view that the soul is immortal and that individuality is retained and affects the living, the Courts can properly say that old doctrines which prevented suits for personal wrongs against the estates of testators have passed away with the reasons which called them forth. As Fichte says, "The grounded is no broader than its foundation." This would simply be carrying out a spirit of the common law which began to crop out more than six hundred years ago in those cases wherein it was held that if the heir be named by the testator he

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was bound to represent the testator in settlement of liability, and also in those early cases holding that where the executor was commanded by the testator to make a contract or to do a certain thing or to take part in legal proceedings, all parties affected might sue the representative as such, although the cause of action could be traced wholly or in part to acts done by the testator in his lifetime.

By the common law an action could be maintained for slandering the dead. We are not aware of any case of the kind in recent years, but we are not cognizant of any rule of law abolishing the action mentioned. It strikes us as an anomaly, as a defect, that an action may be brought to vindicate the name of the dead who have been slandered by the living, and yet that the living are denied the right to vindication when libeled by the dead in a document which the decedent knew would not be effective as a libel until after his death.

There may be some reason yet for the occasional application of the maxim *actio personalis*, etc., when the wrong is done and suffered in the lifetime of the perpetrator. There may be a spirit of forgiveness which may become active at the time of death. It may also be thought by the wronged one that death in a manner brings an acquittal and a requital. But when the wrong is perpetrated after the instigator is gone, and when the injured one recalls and reflects that the wrongdoer cherished his malicious purpose until his last moments, and that he as it were while ascending to heaven or going in the other direction hurled a poisoned dart at the bosom of the object of hate while he was standing on the shore that divides time from eternity, there is not much room for exercising the virtue of forgiveness or in thinking that death has severed the legal bond.

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We shall advert to one other branch of the law, that of principal and agent, for additional analogy. The general rule is that death terminates the relation, but we are unable to discover how this can be so with reference to an agency that is to become effective only after death. Learned counsel for plaintiffs very properly bring to our attention the case of *Gass v. Simpson*, 4 Coldwell, 288, wherein it was held that the possessor of goods may deposit them with a third person with directions to hand them over to a third party in case of the death of the donor within a certain time. The depositary is treated as the agent of the donor for the purpose of carrying his will into effect.

Cases of pure agency as a matter of course are terminated upon the death of the principal. But when the agency is coupled with an interest, how meagre soever it may be in and to the thing to be handled, the relation survives the death of the principal. An executor certainly has an interest in the estate committed to his care. The general rule seems to be that if the acts to be performed by the agent are to be done or may be performed in his own name and without express statement, the relationship is not terminated by death. This phase of the relation is touched upon to some degree in the case of *Taylor v. Benham*, 5 Howard, 233. But the analogies to be thus discovered are somewhat slight. It strikes us that the case at bar can be bottomed upon the broad principle that the law permitted Woodfin in the making of his will to express his wishes, and to nominate a person to declare those wishes to the world, and that when the defendant thus offered the will for probate it was performing an act directly commanded by the testator. We do not think we can view it otherwise than a necessary provision of his will that the executor appear in public and carry out

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the direction and intention of the testator that the good name of his niece be besmirched. The rule, repeated, is that when the personal representative undertakes to carry out a contract or a performance started by his testator, the estate may be held bound for any loss sustained thereby: *Smith v. Coal Company*, 83 Ill., 498; 18 Cyc., 241.

The right to make a will is not an inherent one, as before stated. Society should therefore make it one of the conditions annexed to the privilege, that it be not used as an instrument of vilification. The Courts designated by law to accept and record these documents are the necessary tribunals through which the wills are to operate. It should be looked upon as the duty of the social organization to see that wills are not used as the channels through which warped and shrivelled up human nature may leave a blast and stigma of malicious falsehood upon the fair names of the living. Fichte, to whom reference has heretofore been made, holds it to be the duty of society which through its judicial department gives publicity to an infamous slander, to provide a remedy both for vindication of the name of the injured one and also financial recompense.

But it is said there is no such remedy in our law. It is time the Courts, unless hindered by statute or previous rule, should provide a remedy. It is not uncommon or unwarranted for the Courts to afford redress for wrongs growing even out of statutory regulations although the statutes on the subject be silent; and the Courts do this in order that no wrong shall be tolerated by law as unredressable: *Thomas v. Sylvester*, 8 Q. B., 368.

It would be quite a defect in our system to permit a testator, or rather not be able to prevent him, from libelling an individual, and yet deny him the right to some sort of redress and vindication. The German jurists make

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it the duty of the social organization to provide a means by which a slandered individual may seek redress and reparation, for the reason that the government does not and even cannot undertake to control public opinion. It is therefore the duty, say those jurists, of the State to minimize the means of vilification and to provide or devise some method by which the falsity of an imputation upon the fair name of a member of the social organization may be chosen. We see no reason why Mrs. Harris cannot be treated as vested with the right to her good name and to her freedom from attack at the hands of the estate of her uncle. It seems to us that the Courts are bound thus to recognize her right. Upon what ground and by force of what rule of law can she be denied that right? Is it not the duty of the Court, as said by Lord Kenyon in *Berkeley v. Pressgrave*, 1 East, 228, to recognize this right and to devise some remedy for its violation unless there is a statute or clearly understood rule of law or principle of law which forbids it? It has always been true with the Teutonic peoples that legislatures have not kept pace with the demands of the populace: Jenks' *Law and Politics of Middle Ages*, 145. Among these peoples the Courts, unless restrained by statute or previous judicial declaration, have undertaken to respond to the popular demand. What has been said immediately above must not be understood as a declaration by us, even inferentially, that we are not governed by the law; on the contrary, the law is our dependence. The difficulty is that some people think that the law is a mechanism, a concretion, instead of a spirit or sense of justice. As said by Stammler, a German jurist whose thought and whose language are given to us by Professor Pound, of Harvard, a brilliant and at the same time profound jurist: "Justice through the law instead of justice by law," should be the guide of the

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administer of justice, implying that the law and legal machinery should be used for the purpose of meting out justice instead of being a mechanism without life or spirit. Professor Pound himself, one of the great exponents of high juristic thought in this country, is of opinion that it is the duty of the Courts, where no statute or accepted rule of the common law forbids, to strive to do justice in concrete cases rather than strive for general effect and uniformity: Harvard Law Review, Vol. 25, 515. See also an illuminating article by the same author in No. 20 Green Bag, 401.

We repeat that we meet with no statute nor rule of law which in our judgment can be offered as an effectual barrier to the efforts of Mrs. Harris to obtain reparation. But it is urged that she might obtain relief by a bill in equity or an effort to purge the record. This, if permitted by the law, would be totally inadequate, as this would not afford her any means whatever of showing the falsity of the charge already and almost ineffaceably made public.

Many illustrations of injustice that would result from denying Mrs. Harris redress were presented at the bar, such as the sending of a libelous letter to a third persons and the death of the writer before its reception; also the case of a man who should hurl a stone or a dart, or set a trap or light a fuse and die before consummation of the diabolical purpose. We, in a previous portion of this opinion, intimated that these cases were not entirely analogous to the one at bar, and it was also suggested that the maxim *actio personalis*, etc., might be found embarrassing. But if we were driven to decide the question upon the analogies thus stated, we would feel constrained to accept the opinion of Professor Thayer, the learned lecturer upon torts at Harvard University, that it would be out of harmony with

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the spirit of the times to let the barbarous and archaic maxim debar the injured one of redress.

But we are of opinion that juristically Mrs. Harris does not have to assert that her injury began in the lifetime of the testator. This proposition may sound exceedingly strange, and requires elucidation before persuasive force can be claimed for it. As before stated, we have treated the will as a document in the possession of the writer and never in a legal sense made known to a third person. It was a mere intention to inflict a wrong which might be recalled at any time before death. It was therefore up to the death of Woodfin an act or a deed of which neither the criminal nor civil law could take cognizance; it was not until the death of the testator a justiciable act, as would be the setting of a death trap or hurling of a deadly missile.

The German jurists and also our own Austin and Holland spent a great deal of labor and space in discussing the time at which society through its judicial organs could take cognizance of any act. It is the accepted doctrine that the State cannot or will not notice the mere intention (will, desire) of an individual until there be fruition in the material world. In other words, the State will not provide punishment for nor provide remedies against the entertaining of evil purposes or desires; the will (intention) must result in act before the judicial department can cognize them. As applied to the instant case, why not say that Woodfin did not do a single thing in his lifetime cognizable in a Court of justice at the instance of Mrs. Harris? Why not therefore, once and for all, hold that there never did and never could have existed in Mrs. Harris a right of action for *any* part of a wrong *perpetrated* by Woodfin in his lifetime?

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In one Court only has a case similar to the one at bar arisen, and that one arose in the Probate Court of Pittsburgh, Pa., in 1902. The Justice of the Court, the Hon. William Hawkins, delivered a written opinion, a copy of which has been furnished us. We do not know whether this case was finally prosecuted successfully, nor are we aware of the reason, if any, why it was not taken to the Appellate Court of the State. We have been very much impressed with the reasoning of the learned Judge in his treatment of the question of abatement of actions and are glad to record that they entirely coincide with our own. The decision in the Pennsylvania case was criticized by some one in 15 *Harvard Law Review*. Nevertheless, we think the reasoning of the Pittsburgh jurist was not lamed by the review. The reviewer was of the emphatic opinion that the action could not be sustained upon common law principles, but that there might be some foundation for it according to the principles of the Roman law. To the latter statement we give our ready assent. We think it clearly deducible from the laws governing *fidei commissa* and heirs under the civil law, that the estate should be treated as the successor and representative of the testator in a juristic sense, and suable for the acts of the estator. But we are of the opinion that this action is also maintainable upon the principles of the common law, and that we meet the requirement of Lord Coke that before a new doctrine be accepted or a precedent established, it be ascertained to be congruous with the received maxims and principles of the common law.

We find nothing in the case of *Cherry v. Harding*, 4 Heisk., 199, or *Griffith v. Beasley*, 10 Yer., 434, brought to our attention by learned counsel for defendant, which stands in the way of the conclusion which we have reached.

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It was remarked, with what juridical significance we do not know, that the defendant here was not sued in its individual capacity. This could hardly be conceived of in view of the statute which makes it a felony to conceal a will or to prevent its tender for probate. The defendant was strictly in the performance of an impersonal, representative act. This was and is known of all men that according to the law of principal and agent, the agent could not well be held personally liable. The resentful-referring feelings mentioned in the scheme of Durling could not be considered as directed toward the defendant but toward the estate which it represents. The desire for satisfaction (removal of pain consequent upon injustice) mentioned by Ward could not be directed at the defendant as the blameable one nor as the source from which society should exact reparation. Hence, society should make its request for restitution of that entity from which the wrongs must be considered as flowing.

There is nothing far-fetched in treating the estate of a testator as representing him, as embodying or materializing his wishes and desires. Society permits him, as it were, to project himself into a period beyond death. This certainly should be on the condition that he, in exercising this great privilege, this clothing himself with a semi-immortality, not do a great and irreparable wrong to an innocent and unoffending woman. In this day of trusts created by will and grown enormously, there is nothing strange or unreasonable in society demanding the proper balance of rights, requiring restitution or compensation for injuries done by the agents of these trusts in carrying out the instructions of the settlors. There would be something radically wrong in a social organization which tolerated such a practice and acknowledged itself impotent to afford redress. It is our pleasure to state that in

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the instant case in disagreeing with the contentions of learned counsel for defendant, our feelings and our sense of duty entirely coincide, and that in holding this action sustainable we are promoting within the rules and spirit of our conception of the common law the best interests of the society in which we live, and that in taking this position we refute the suggestion that the Courts of this State are powerless to afford protection to almost the most sacred possession recognized by the law.

The judgment of the lower Court dismissing the suit is reversed and the cause is remanded for plea and further proceeding not inconsistent with this opinion.

There may be found in the foregoing opinion much that appears irrelevant. We have felt, however, that we were justified in availing ourselves of every possible ray of light, faint though some may seem. Realizing that the question was new and that upon its correct solution an appreciable modicum of the welfare of society rests, we have endeavored to exhibit almost every reason occurring to us, great or small, which furnishes support for our conclusions. We realize further that if the Courts are to step beyond the treadmill of judicial precedent and mechanical jurisprudence, they must lift their eyes above the ground and grasp the splendid juristic conceptions of the profound speculators upon the philosophy of rights. The instant case forcibly illustrates what was said by the poet-jurist Shakespeare, "that the evil that men do (or conceive) lives after them," and, further, as observed by Lord Bacon, with a slight variance of expression, "that the contributors to the jurisprudence of a country beware lest the living be slain by the arms (darts) of the dead."

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H. W. BENNETT v. VOLUNTEER STATE LIFE INSURANCE
COMPANY.

Writ of certiorari denied by the Supreme Court,
Nashville, 1913.

1. COSTS. *Personal liability of administrator who is sole beneficiary. Insolvency of estate.*

In a suit instituted by a father as sole beneficiary for the wrongful death of the son, the father may be held personally liable for costs of his unsuccessful suit in case the estate of the son proved to be insolvent.

2. SAME. *Reference to clerk.*

Upon motion to retax costs, this Court will refer the questions to the clerk for examination of the record and report if they are complicated and extensive.

FROM MONTGOMERY COUNTY.

Appeal in error from the Circuit Court of Montgomery County. W. B. COOK, Judge.

S. B. SMITH and A. R. GHOLSON for the Insurance Company.

SAVAGE & FORT and AUSTIN PEAY for the Administrator.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS case is before us for the purpose of a re-taxation of the costs and for the determination of the question as

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to whether certain money paid in in the case should go to relieve the insurance company or the sureties on the bond of the administrator.

The facts necessary to be stated are these:

A suit was brought on a policy of insurance issued by the insurance company on the life of one Voyn Bennett, which policy was payable to the executors, administrators, or assigns of the assured. Voyn Bennett was killed while riding masked and armed as a night rider.

This Court and the Supreme Court held that, under the clause in the policy providing that the company should not be liable, if within two years the insured came to his death as the result of his own criminal action, the policy should be avoided. Thus holding, this Court, affirmed by the Supreme Court, dismissed the case.

It appears that the case had been originally tried before the Circuit Judge without a jury, and the Circuit Judge gave a judgment for the full amount of the policy and interest against the insurance company. From this judgment an appeal was taken to this Court with the result before stated.

The clerk of the Circuit Court of Montgomery County moved for judgment over against the insurance company for all the costs incurred on the appeal, less the sum of \$250.00, which had been paid, \$190.00 of this being an amount paid in by the Insurance Company under the terms of its contract, which provided for the return of the premiums paid. It appears that Voyn Bennett was unmarried and was eighteen or nineteen years of age; that he left no children, and that, therefore, under the laws of Tennessee his father was his sole beneficiary under the policy. In this case his father sued as administrator for the benefit of himself and not for the benefit of the heirs of the deceased, Voyn Bennett.

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It is stated that he has made no return as administrator; that he has not accounted as administrator, but as trustee for himself, he being the sole beneficiary in the suit. He had exclusive charge of the suit, and had the right to determine whether it should be brought or not. The insistence of the Insurance Company is, that, under the facts, the father is personally liable for the costs of this case, and that there should be a return of *nulla bona* as against him, personally, before there can be any judgment over against appellant, the Insurance Company. In other words, the insistence of the Insurance Company is, that, under the sections of the Code, Shannon, sections 4938, 4941 and 4962. Mr. Bennett was, in fact, the real party in interest, and that he should not be permitted to go free, as to costs, and to place the burden upon the Insurance Company, simply because, by provision of the policy, it was necessary for him to bring suit as administrator for the benefit of himself as an individual.

In support of this contention, we are referred to the case of *Railroad v. Brown*, 125 Tenn., 351, in which the Court held that where an administrator sues for the benefit of himself and other distributees of a party wrongfully killed, in which case the damages go to the distributees free from the claims of creditors of the deceased, the administrator sues as an express trustee and not as an administrator.

We are also referred to the case of *Barbee v. Frazier*, 9 Lea, 348, in which case a suit was brought by an administrator of his son for his wrongful death and he sought to bring the suit on the pauper's oath.

The Court said:

"Can this suit be maintained by the administrator without bond? The plaintiff is the father and sole bene-

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ficiary in the suit and might under our statutes have brought the suit in his own name for his own benefit.

“Without, therefore, discussing or determining the question whether an administrator may in ordinary cases prosecute a suit in *forma pauperis*, we hold that in a case like this, when an administrator is personally sole beneficiary of any recovery that may be had, while he may in his individual character maintain the suit, he cannot in the character of administrator prosecute such action in *forma pauperis*.”

The distinction in that case from the case before us is, that in the Frazier case, 9 Lea, *supra*, the administrator might have sued in his own name and for his own benefit. In the case before us it was necessary for him to sue as administrator because of the form of the contract of insurance. Nevertheless, it is insisted that he was the sole beneficiary; that he qualified as administrator; that he controlled the suit; that he incurred the costs, and had he been successful he would have been entitled to the entire seven thousand dollars sued for, but being unsuccessful he seeks to get behind his representative character and to cause a successful defendant to pay for his experiment with the law.

We think that the Insurance Company is entitled to the benefit of the sum it paid in in satisfaction of the cost it will have to pay by virtue of the fact that no cost can be made out of plaintiff administrator below. There is also complaint made with respect to the taxation of costs. In other words, the insistence is, that an immense amount of overcosts have been taxed, these costs growing out of the making up of the transcript.

We have not the time to go over this immense transcript and count the words making it up. Under our law,

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clerks, in making out transcripts for this Court, are entitled to charge so much for every hundred words and no more. In order to determine this question, this part of the motion, and this matter involved, is referred to the clerk of this Court, who will take the transcript of the record and ascertain the words making it up and allow the proper statutory charge for every hundred words.

We hold that the sureties on the prosecution bond of the administrator are liable to the extent of the bond in the payment of the cost, which cannot be lessened by the return premiums paid into Court by the Insurance Company. In other words, we hold that the returned premiums paid into Court by the Insurance Company will be applied to the payment of costs after the penalty of the prosecution bond of the administrator is applied to the payment of cost.

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VOLUNTEER STATE LIFE INSURANCE COMPANY v. H. W.
BENNETT, ADMINISTRATOR.

Writ of certiorari denied by the Supreme Court.
Nashville, 1913.

LIFE INSURANCE. Losing of life by insured while engaged in night-riding. Violation of clause prohibiting engagement in unlawful acts.

The intestate of defendant in error was killed while riding masked and in the night time contrary to the statutes of the State. He was the holder of a policy of insurance containing the provision that the company was exempt from liability if the insured should meet his death while violating the law. Held, that the beneficiary could not recover.

FROM MONTGOMERY COUNTY.

Appeal in error from the Circuit Court of Montgomery County. W. B. Cook, Judge.

S. B. SMITH, W. D. CARSWELL and A. R. GHOLSON
for Plaintiff in Error.

SAVAGE & FORT and AUSTIN PEAY for Defendant in
Error.

MR. JUSTICE HIGGINS delivered the opinion of the
Court.

VOYAN BENNETT was the holder of a life insurance policy issued to him by the plaintiff in error. His father was beneficiary. The policy contained a clause to the effect that the company would not be liable in case the

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insured met his death while violating the law of the land. Bennett was shot and killed by unknown parties while riding upon the highway armed and in disguise as a member of a marauding or night-riding gang in Montgomery County. As to who did the shooting, there is some doubt, and there is some controversy as to some of the particulars of his death. He seems to have been shot from ambush or *quasi*-ambush. There is, however, but one conclusion warranted from the undisputed testimony, and that is that Bennett was a member of a night-riding squad and was at the time disguised, equipped and abroad in violation of our Ku-Kluxing and night-riding statutes. In our opinion, a further and inevitable deduction is that he was shot by someone interested in putting a stop to depredations, and that he was killed solely and only because of the fact that he was at the time performing an unlawful act.

It is conceded that if at the time young Bennett was shot he was violating the law of the land and this violation was a proximate contributing cause of his death, there can be no recovery under that provision of the policy which stipulates that there can be no recovery in such case. The majority are of the opinion that the facts conclusively show that at the time Bennett was shot, he was violating one or more of the wholesome statutes of the State and that he would not have been harmed if he had not at the time been disregarding the regulations thus made for the preservation of society and the maintenance of the law. In other words, it was demonstrated by the plaintiff in error that young Bennett was shot solely and only because at the time he was committing criminal acts. It is too clear for argument that if Bennett had not been armed and masked and riding on the highway after night to the terror of the people he never would have been slain at the hands of these

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vindicators of the law. There is not any room for controversy but that his flagrant violation of the statutes made to protect the people situated and conditions as were the citizens of Montgomery County at that time he never would have been the object of the regulators' bullets. The appearance of masked and armed men upon the highway at such times as then obtained was an overt act, was a direct assault, was a direct attack upon the citizens and upon the peace and good order of the community. This appearance was a direct appeal to the protective instinct of every one not in sympathy with the marauding band. But for this show of force, this arousing of the terror of the people, this destruction of the social entity or threatened destruction thereof, Bennett would have been alive today. Hence, the conclusion that he came to his death because he was violating the law is inevitable. His criminal conduct provoked it, superinduced it, directly brought it about. We see no room for the argument that his lawless conduct was not the proximate, contributing cause to his death. He had no right to attempt to impose his will and that of his companions upon the citizens of the community by his high-handed methods. His effort to do so was the stimulator of the determination to wound or kill him. His presistence in his unlawful course could but culminate in something terrible. He should be held to have taken the risk.

It would not be a novel or nonjuridical application of the doctrine of assumed risk to hold that young Bennett when he entered upon the highway in plain violation of the statutes assumed the risk of his taking off. He must have known that he was committing a felony by his very appearance with concealed features and with deadly arms upon the public road. He must have known that this could be treated as a felonious assault upon the security and in-

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tegrity of the society in which he was moving. Every law recognizes the right to resent these veiled attacks. There is therefore nothing illogical in holding that when he entered upon his marauding expeditions he assumed the risk of bullets at the hands of those who justly felt outraged by his conduct. It is unjust to visit the consequences of this rash assumption upon an insurance company. His obligation was to refrain from engaging in acts of an unlawful kind which would bring about his destruction. By his conduct as revealed in this record he violated this obligation, and in the judgment of the majority forfeited any right in any beneficiary to recover.

The judgment of the lower Court is reversed. Justice Hughes does not concur, being of opinion that the question of proximate cause was one for the jury.

DELLA GALLAGHER V. KNOXVILLE IRON COMPANY, ET AL.

Writ of certiorari denied by the Supreme Court,
at Knoxville, 1918.

1. *DIVORCE. Decree procured by fraud. Annulment after death of party.*

A decree of divorce procured by fraud will be set aside at the instance of the wife even after the death of the husband.

2. *SAME. Fraud as to jurisdiction and as to grounds.*

A decree of divorce obtained in a Court having no jurisdiction, or where the jurisdiction is obtained by fraud, or where the grounds of divorce against a non-resident of the county are fraudulently contrived, will be annulled at the suit of the wife.

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3. SAME. *Suit against parties whose residence is unknown. Practice.*

A suit for divorce filed against a defendant whose residence is alleged to be unknown, followed by a recital in the bill and in the decree that the defendant is a non-resident, will not confer jurisdiction of the defendant. It is necessary in a bill filed against a defendant whose residence is unknown for the complainant to state on oath, either in the bill or in an affidavit, and to prove, that the residence of the defendant is unknown and that it could not be ascertained after proper and diligent inquiry.

4. SAME. *Decree rendered without actual or constructive notice.*

A decree of divorce rendered without actual or constructive notice to the defendant is absolutely void. And when constructive notice is relied upon, the statutes providing for the same must be strictly observed.

FROM ANDERSON COUNTY.

Appeal from the Chancery Court of Anderson County.
H. J. KYLE, Chancellor.

WALLACE & BURNETT for Appellant.

SAWYER & HICKS and J. H. UNDERWOOD for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

ON the 4th day of May, 1912, Della Gallagher filed this bill in the Chancery Court of Anderson County against one Sallie Gallagher and one G. W. Jackson, and the Knoxville Iron Company. The relief sought was primarily to have an alleged decree of divorce pronounced by the Circuit Court of Blount County, in 1910, set aside for defects in the proceedings and because of fraud in the

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procurement of the decree, and, secondarily, to restrain Sallie Gallagher from asserting her claim as the widow of one Ben Gallagher, deceased, to the recovery of damages in a suit instituted by Jackson against the Knoxville Iron Company for the wrongful killing of Ben Gallagher.

All parties answered. The Chancellor granted the relief sought and from this decree Sallie Gallagher alone prayed and perfected her appeal. Two questions are pressed upon us by learned counsel as grounds for the reversal of the decree of the Chancellor.

The first assignment of error is that the Court, at the April, 1913, term, erroneously declined to grant the appellant a continuance. It is well pointed out by the appellee that the affidavit made in support of the motion for a continuance is not properly before us for review. In the first place it nowhere bears the endorsement of the fact and date of its filing. In the next place, it was not made a part of the record by the bill of exceptions, or by the decree. It is true that an affidavit of Attorney Wallace is mentioned in the decree, but it is not so identified by the phraseology of the decree as to need no additional certification. It ought to have been made a part of the record by a bill of exceptions or it ought to have been specifically identified and described by the decree.

But if we treat the affidavit as properly before us, we are unable to see wherein the Chancellor abused his discretion in declining a continuance. The bill was filed on May 4, 1912. On July 19, 1912, Sallie Gallagher answered. Complainant began taking her proof in August, 1912. The last deposition taken by her was in October, 1912. At the October term, 1912, there was a consent order continuing this case and remanding it to the rules for additional proof, the exact date of continuance being October 9. It seems that complainant ceased taking any

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additional proof. After the lapse of about four months, or to be exact, in February, 1913, appellant gave her own deposition. The record discloses no other proof filed by her and no subpoenas issued for witnesses. On the 8th of April, 1913, the affidavit referred to was filed. The matters set forth therein were simply appeals to the discretion of the Chancellor, and, as before stated, there was no abuse of discretion.

The effort evidenced by this affidavit was to procure witnesses by whom appellant could prove that complainant was aware of the pendency of the divorce suit, and that she failed to make any objection; and, further, that she had, in fact, been guilty of adultery as charged in the divorce bill of her husband. The Chancellor was not in error in holding that these matters were immaterial. A party who is not actually in Court is not bound to put in an appearance; and if it be admitted that complainant had committed adultery, this would not have entitled her husband to a divorce in the absence of a showing that he had remained virtuous and had not connived at her conduct and had not condoned the same. We overrule the first assignment of error.

It is next insisted that the facts did not warrant the Chancellor in granting complainant relief. It appears from the pleadings and the proof that in November, 1911, after complainant's husband had secured his decree, he undertook to intermarry with appellant, Sallie Gallagher. After living with her some two or three weeks, he left and went to work in the mines of the Knoxville Iron Company in Anderson County, and while so engaged he was killed as the result of an explosion. Soon after his death, defendant G. W. Jackson qualified as administrator and brought suit for the benefit of Sallie Gallagher as his widow and beneficiary. As a matter of fact, appellant

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and Ben Gallagher did go through the form of a marriage ceremony and doubtless appellant acted in good faith and in ignorance of any invalidity in the divorce proceedings.

It appears that complainant was in Loudon County, in a remote section, and did not learn of the death of her husband until some weeks thereafter. She had no notice of the filing of the bill for divorce and was not aware of the granting of the decree until informed by Jackson of this fact soon after his appointment as the administrator. Her bill was filed within a short while after she became informed of the proceedings. There was born to her as the result of her marriage with Ben Gallagher a child, who was living at the date of the filing of this bill.

As the record stands, the essential averments of complainant's bill respecting the fraud practiced by her deceased husband in procuring his decree for divorce are fully sustained. It clearly appears that he sent her away from his home for the express purpose of filing a bill, and that his object in sending her out of the county was to obviate the service of personal process upon her. It is shown that he knew at the time he made the affidavit to his bill that she was at the home of her mother and that his affidavit was willfully false and fraudulently made. There is also proof to the effect that his averment of her adulterous conduct was falsely made. The case developed by the proof is, in short, that of a man who desired to get rid of his wife by sending her to a remote place and then swearing that her residence was unknown, and otherwise imposing upon the Court.

We are of opinion that, notwithstanding a complainant has a number of grounds of divorce, he disentitles himself to a decree when he appears in Court with the fraudulent and sinister design of securing his decree by misrepresentation, perjury and deception. Especially should

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a decree thus obtained be adjudged void if the fraud practiced appertain to jurisdiction either of complainant or defendant. In the instant case there was a fraudulent and deliberate effort upon the part of Gallagher to make it appear that his wife had disappeared so that personal service of process could not be had upon her. This was done by him when he knew that his wife was at the home of her mother with her little child, awaiting his summons to return to him, and when he knew that this averment and his testimony that she had deserted him and disappeared with a paramour were without foundation.

We have no hesitancy in saying that the decree of the Chancellor was warranted by the facts. No authorities are needed to sustain the proposition that a decree of divorce obtained by fraud may be collaterally attacked, and that this may be done by the defendant, even after the death of the party who sought the decree. And this relief may be sought against any party who is asserting that he or she is the surviving spouse of the one who sought the divorce. This has been held so often that citation of authorities is useless. We refer, however, to an opinion rendered by this Court through Justice Wilson at the May, 1911, term at Knoxville, in the case of *Melnicove v. Melnicove*, from the Chancery Court of Hamilton County.

We are also of the opinion that the Circuit Court of Roane County never obtained jurisdiction of the person of complainant, and for that reason the decree of divorce was void. In the caption of the bill for divorce it is stated that the residence of complainant was unknown. In the body of the bill it is averred in substance that complainant had left her husband, and he supposed that she went to her people in Loudon County, but that diligent inquiry failed to locate her. It is urged by learned counsel for appellant that this is a sufficient compliance with subsec-

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tion 5 of 6162, Shannon's Code, which in substance requires a complainant who seeks relief against a party whose residence is unknown to state in the bill or by affidavit that the residence of the defendant is unknown and cannot be ascertained upon diligent inquiry.

Gallagher's attorney failed signally to comply with these provisions. An averment that diligent inquiry failed to locate the defendant is not at all an equivalent of the averment that he did not know of her residence and that he could not ascertain this residence after diligent inquiry therefor. There is a marked difference between an allegation that a party had made diligent inquiry for the purpose of locating a defendant and an averment that her residence was unknown to complainant although diligent inquiry had been made.

It is axiomatic that a decree of divorce obtained without actual or constructive service of process is absolutely void. There can be no constructive service except in those cases where some substituted service prescribed by statute is strictly observed. This defect in the proceeding and the fraud practiced upon the Court by Gallagher furnish all needed ground for an adjudication that the decree of divorce obtained by Gallagher was void, and that the subsequent marriage of Sallie Gallagher to Ben Gallagher was illegal. It follows as a matter of course that she cannot assert any of the rights of a widow.

The decree of the Chancellor is in all respects affirmed with this possible modification: Jackson as administrator will not be restrained from prosecuting his action against the Knoxville Iron Company but he will be restrained from prosecuting it for the benefit of Sallie Gallagher. In other words, he will proceed with it in behalf of the true beneficiaries, namely, the widow and child of of his intestate. Sallie Gallagher will pay all the costs of this proceeding.

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